

Advanced Issues in U Visa and U Adjustment of Status

by Kyle Dandeleit, Alison Kamhi, Karen Crawford, and Amy Cheung

Kyle Dandeleit is the Pro Bono Immigration Attorney at Cleary Gottlieb Steen & Hamilton LLP in New York. He manages the firm's award-winning pro bono immigration practice and maintains an active docket of cases focused primarily on the representation of domestic violence and human trafficking survivors. He also currently serves as the chair of AILA's VAWA, Us, and Ts National Committee.

Alison Kamhi is a Supervising Attorney at the Immigrant Legal Resource Center, based in San Francisco. Alison leads the ILRC's Immigrant Survivors Team and conducts frequent in-person and webinar trainings on U visas, naturalization and citizenship, family-based immigration, and FOIA requests. She also provides technical assistance through the ILRC's Attorney of the Day program on a wide range of immigration issues. She has co-authored a number of publications, including the ILRC's bestselling manual "The U Visa: Obtaining Status for Immigrant Victims of Crimes."

Karen Crawford has been practicing immigration law since 1993. She earned her law degree from Boston College, where she also received a Master's in Social Work, focusing on Community Organizing, Social Planning and Policy. She obtained her undergraduate degree in psychology at Harvard University. She is currently in private practice, and her firm handles U visas. In the past, she has served as an adjunct clinical professor at the University of Texas Law School Immigration Clinic, and as Legal Director and later Interim Executive Director of American Gateways in Austin. She is a commissioner on the City of Austin's Commission on Immigrant Affairs, formerly serving as its chair, and serves on the State Bar of Texas Committee on Laws Relating to Immigration and Nationality.

Amy Cheung is Senior Legal Counsel with ASISTA Immigration Assistance, where she provides training, technical assistance, and litigation support on U visa, T visa, and VAWA-related issues. Previously, Amy was a staff attorney at the Tahirih Justice Center where she represented immigrant women and children in their applications for asylum, VAWA, and U and T visa applications. Before that, she represented detained and post-release unaccompanied minors at Catholic Charities of the Archdiocese of Galveston-Houston. Amy currently serves as a member of AILA's VAWA, Us, and Ts National Committee.

This practice advisory addresses a recent case law development regarding derivative eligibility for U visa qualifying family members, the use of discretion in waivers of inadmissibility for U visas, as well as common issues in U-based adjustment of status, such as addressing unwaived grounds of inadmissibility and negative discretionary factors.

Table of Contents:

- I. *Medina Tovar v. Zuchowski*, 982 F. 3d 631 (9th Cir. 2020)
- II. Discretionary Waiver of Inadmissibility Under INA §212(d)(14)
- III. Adjustment of Status for U Nonimmigrants

***Medina Tovar v. Zuchowski*, 982 F. 3d 631 (9th Cir. 2020)**

On December 3, 2020, the U.S. Court of Appeals for the Ninth Circuit issued a landmark decision in *Medina Tovar v. Zuchowski*, 982 F.3d 631 (9th Cir. 2020), expanding derivative status to spouses of U nonimmigrant status petitioners who married after filing the Form I-918, Petition for U Nonimmigrant Status. Prior to this decision, U.S. Citizenship and Immigration Services (USCIS) had required that the spousal relationship between a U principal (the "U-1") and their

derivative spouse exist at the time of filing the Form I-918 in order for a spouse to be considered a qualifying family member.¹

Background

There are several different ways that family members of survivors of serious crimes can obtain U nonimmigrant status. One of the most common ways is when the principal U petitioner petitions for qualifying family members as derivatives by filing the Form I-918, Supplement A. A principal petitioner can petition for a spouse and child (unmarried and under age 21); and if the petitioner is under twenty-one, they can also petition for their parents and siblings (unmarried and under age 18).²

Under USCIS's prior interpretation, if a U-1 and their spouse married after the Form I-918 had been filed, the spouse would not be eligible for the Supplement A, and would instead have to wait for the U-1 to apply for adjustment of status and file the Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant, which would delay the spouse's eligibility for lawful status and employment authorization by at least three years.

The Court's Reasoning

In *Medina Tovar v. Zuchowski*, the *en banc* Court found that a spouse need not have been married to the principal applicant at the time the U petition was filed, so long as the marriage existed when the principal's U nonimmigrant status was ultimately granted. The Court found that 8 USC §1101(a)(15)(U) laid out the criteria for when a spouse could be included and did not require that the marriage exist at the time of filing. The Court found that USCIS could not add a timing requirement when Congress specifically did not include one.

Moreover, the Court found that the statute's use of the term "accompanying, or following to join," must be interpreted as it is elsewhere in the Immigration and Nationality Act (INA). In other contexts in the INA, "that phrase had uniformly, and for decades, been interpreted to mean that eligibility for derivative status is measured at the time the principal petitioner is granted an immigration benefit, not at the earlier time when the principal petitioner applied for that benefit."³ The Court thus held USCIS's regulation invalid insofar as it requires that the spousal relationship exist at the time of filing.

Impact of Medina Tovar

This case dramatically expands the number of people who can file for U nonimmigrant status. Because of the extensive case processing times,⁴ many U petitioners may marry spouses during the time that their U petitions are pending. Those after-acquired spouses could not qualify as derivatives under the previous requirements and would have had to wait for the U-1 to adjust status before becoming eligible for the Form I-929. Under *Medina Tovar*, because they are married at

¹ 8 CFR §212.17(f)(4).

² INA §101(a)(15)(U)(ii).

³ *Medina Tovar*, 982 F.3d at 636.

⁴ The average U nonimmigrant status petition processing time is 58.5-59 months as of the writing of this advisory.

the time the U petition is finally adjudicated, those spouses may now be able to get lawful status many years earlier.

At the time of this writing (April 2021), the government has not appealed this *en banc* decision, but the appeal window is open until May 2, 2021. In the meantime, USCIS has not indicated whether it will apply the holding of this case nationwide, or just in the Ninth Circuit. It is similarly unclear whether USCIS will expand this holding to other forms of relief with similar derivative eligibility issues, such as T nonimmigrant status.

Thus, much remains to be seen. However, within the Ninth Circuit, *Medina Tovar* represents current law, and USCIS must accept Supplement A derivative petitions for after-acquired spouses in the Ninth Circuit at this time. Practitioners outside of the Ninth Circuit may want to make a case-by-case determination with their client as to whether to file a derivative application for an after-acquired spouse based on the reasoning in *Medina-Tovar*. Some considerations may include: current risk of enforcement, eligibility for other forms of relief, urgency, back-up options for the client, finances, and the client's appetite for risk.

DISCRETIONARY WAIVER OF INADMISSIBILITY UNDER INA §212(D)(14)

Waivers Under INA §§212(d)(14) and 212(d)(3)

As part of the U visa program's broad protection of survivors, Congress provided for a waiver specific to U nonimmigrant admissions, INA §212(d)(14), which states:

The Secretary of Homeland Security, in the Attorney General's discretion, may waive the application of subsection (a) (other than paragraph (3)(E)) in the case of a nonimmigrant described in section 1101(a)(15)(U) of this title, if the Secretary of Homeland Security considers it to be in the public or national interest to do so.

This expansive waiver provision allows for waiver of all grounds of inadmissibility except INA §212(a)(3)(E) (Nazi persecution, genocide, torture or extrajudicial killings).

The regulations, at 8 CFR §§212.17(a) and (b), also allow for waivers under INA §212(d)(3), the general nonimmigrant waiver. Section (d)(3) states in relevant part:

(A) Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa (...) may (...) be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant in the discretion of the Attorney General.

Although Congress created the U visa waiver provision, USCIS has never issued guidance on what "in the national or public interest" means. Attorneys should argue that in order to properly adjudicate the §212(d)(14) waiver request, USCIS must assess the national or public interest implications of granting the waiver. Moreover, the agency should give particular consideration to the fact that Congress created the U visa program in order to serve dual public interests: protecting

immigrant victims of crime and strengthening law enforcement's ability to investigate and prosecute crime.⁵

In practice, because the agency has never defined “public or national interest,” USCIS regularly adjudicates U visa waivers under the §212(d)(3) standard, applying the *Hranka* factors (“risk of harm to society if the applicant is admitted (...) seriousness of the applicant’s prior immigration law, or criminal law, violations (...), nature of the applicant’s reasons for wishing to enter the United States”).⁶ Correspondingly, in its requests for evidence, USCIS often requests evidence of rehabilitation, the reasons the person wishes to remain in the U.S., any mitigating factors, any special circumstances surrounding the act from which inadmissibility arises, loss of access to the criminal justice system, and the need for any medical, mental health, or social services and the unavailability of those services in the person’s home country. Practitioners should address both the §212(d)(14) and (d)(3) standards when filing waiver requests.

Addressing Discretionary Implications of Criminal History

Even where a petitioner is not inadmissible on criminal grounds, USCIS will consider criminal history as a negative discretionary factor in adjudicating a waiver application. Where the petitioner is inadmissible on criminal grounds, “USCIS will consider the number and severity of the offenses of which the applicant has been convicted. In cases involving violent or dangerous crimes or inadmissibility based on the security and related grounds in section 212(a)(3) of the Act, USCIS will only exercise favorable discretion in extraordinary circumstances.”⁷

Every applicant must prove that he or she warrants an exercise of discretion. In requests for evidence, USCIS cites family ties to the United States, residence of long duration, hardship to the applicant or family members, service in the armed forces, history of employment, business or property ties in the United States, evidence of value or service to the community, and evidence of rehabilitation as discretionary factors. USCIS also considers the length of time that has passed since the offense, which is related to the “risk of harm to society” factor from *Hranka*. In addition, the more inadmissibility grounds apply and the more serious the grounds, the more evidence of discretion is needed. For example, a person who only needs a waiver for presence without admission generally needs less evidence of discretion than a person with a criminal ground of inadmissibility.

While there is no statutory or regulatory prohibition against granting a U visa waiver to someone who commits a crime against another person (except where the perpetrator seeks derivative status based on the crime he or she committed), USCIS closely reviews criminal offenses where there is a victim, such as assault offenses. USCIS has sometimes taken the position that since the U visa program is meant to protect victims, where a petitioner created a victim by assaulting a person, he or she does not warrant a favorable exercise of discretion.

Practice Tip: In any case where there is a criminal offense, even if it does not create inadmissibility, additional evidence of discretion is needed. In cases in which the

⁵ See Victims of Trafficking and Violence Protection Act of 2000, at §1513(a)(2)(A); 146 Cong. Rec. S10185 (2000).

⁶ *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978).

⁷ 8 CFR §212.17(b)(2).

petitioner was convicted of a crime that could be considered a qualifying crime for a U visa, you should present additional evidence of discretion at a higher standard. Pay particular attention to evidence of rehabilitation, and where possible, demonstrate the connection between the offense and the client's own traumatic experiences.

ADJUSTMENT OF STATUS FOR U NONIMMIGRANTS

To adjust status under INA §245(m), U visa holders must demonstrate that (i) they were lawfully admitted as U nonimmigrants and continue to hold such status at the time of filing the adjustment application; (ii) they have been continuously physically present in the U.S. for 3 years in U nonimmigrant status; (iii) they are not inadmissible under INA §212(a)(3)(E) (Nazi persecution, genocide, torture, or extrajudicial killing); (iv) they have not unreasonably refused to assist law enforcement in the investigation or prosecution of the qualifying criminal activity; (v) their presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is in the public interest; and (vi) discretion should be exercised in their favor.⁸

With the exception of admissibility under INA §212(a)(3)(E), U visa holders are not otherwise required to demonstrate that they are admissible when applying to adjust status under INA §245(m).⁹ However, in determining whether discretion should be exercised in an adjustment applicant's favor, USCIS "take[s] into account all factors, including acts that would otherwise render the applicant inadmissible."¹⁰ Given this framework, the following issues often arise at the adjustment stage:

- a. **Issue 1:** When USCIS granted the U visa, USCIS did not waive all applicable grounds of inadmissibility because the applicant did not disclose them or USCIS made an error.
- b. **Issue 2:** After receiving the U visa, the applicant accrues one or more new grounds of inadmissibility.
- c. **Issue 3:** When adjudicating the adjustment application, USCIS revisits grounds of inadmissibility and/or negative discretionary factors that the U visa holder previously addressed in the U visa petition.

Issue 1: When USCIS Granted the U Visa, USCIS Did Not Waive All Applicable Grounds of Inadmissibility Because the Applicant Did Not Disclose Them or USCIS Made an Error

At times, practitioners discover that a client who is now applying for adjustment of status under INA §245(m) had grounds of inadmissibility that were not waived at the time of the U nonimmigrant admission. This issue may arise because of attorney error, because the client forgot some details from their immigration or criminal history, or because USCIS may have erroneously determined that a ground did not apply, among other reasons.

⁸ INA §245(m)(1); 8 CFR §§245.24(b), 245.24(d)(11).

⁹ 8 CFR §245.24(d)(11).

¹⁰ 8 CFR §245.24(d)(11).

Regardless of the reason for the error, it is important to address the unwaived inadmissibility grounds because although INA §245(m) does not require admissibility, USCIS does require that the applicant have been “lawfully admitted” in U nonimmigrant status.¹¹ A lawful admission requires substantive eligibility for the admission, even in the absence of fraud or misrepresentation.¹² Where there are inadmissibility grounds that remained unwaived at the time of the U visa approval, the person has not been lawfully admitted because the U visa, unlike U-based adjustment of status, does require a showing of admissibility.¹³

Practice Tip: To determine if all applicable grounds were actually waived at the time of the U visa approval, practitioners should file a FOIA request for the A-file, and in particular, for the Form I-192 approval sheet that lists the waived grounds of inadmissibility. At times, officers may approve waivers for grounds that were not listed on the Form I-192; other times, they may erroneously omit grounds that are included on the waiver request. Prior to 2020, USCIS did not provide applicants or counsel with a list of the waived grounds on the Form I-192 approval notice.

In practice, USCIS is inconsistent in how it treats U-based adjustment applications where there are unwaived grounds of inadmissibility that pre-date the U visa approval. However, the agency’s practice generally falls into three categories:

USCIS Considers the Unwaived Grounds in the Exercise of Discretion

Historically, U adjustment applicants who discovered unwaived inadmissibility grounds would submit a declaration with the Form I-485 to explain the facts and circumstances surrounding the ground(s) and why the ground(s) were not disclosed or waived. In most cases, USCIS would consider those statements in the exercise of discretion and then grant the adjustment without requiring a new or amended waiver of inadmissibility.

USCIS continues to do this in some cases, but practices vary by officer, and it is difficult to predict what will happen in any particular case. It is also unclear how USCIS will treat naturalization applications for permanent residents who adjusted status without retroactively correcting the unwaived grounds of inadmissibility. An applicant for naturalization must have been “lawfully admitted . . . for permanent residence.”¹⁴ Arguably, a U nonimmigrant can lawfully adjust status even if the underlying U visa was improperly granted because INA §245(m) can be read to require only a procedurally regular admission. However, because 8 CFR §245.24(b)(2)(i) does require a lawful admission, it is possible that USCIS would deem the applicant ineligible for naturalization if the inadmissibility grounds are not waived. In practice, it appears that treatment of this scenario varies by field office.

¹¹ 8 CFR §245.24(b)(2)(i). However, note that INA §245(m) only requires that the applicant have been “admitted” in U nonimmigrant status. Practitioners may consider arguing that the regulatory requirement of a *lawful* admission is *ultra vires* to the statute but should be aware that such an argument is unlikely to succeed before USCIS.

¹² *See, e.g., Turfah v. USCIS*, 845 F.3d 668 (6th Cir. 2017) (holding that naturalization applicant who was improperly admitted as LPR through USCIS error was not “lawfully admitted” as a permanent resident for naturalization purposes).

¹³ Compare INA §212(d)(14) and INA §245(m).

¹⁴ INA §318.

USCIS Waives the Unwaived Grounds *Nunc Pro Tunc*

In other cases, USCIS may require a waiver of inadmissibility to remedy the unwaived ground(s). A waiver in this scenario should be filed as a *nunc pro tunc* amendment of the original Form I-192 because the objective is to render the U visa admission retroactively lawful from the time of approval. Two sample *nunc pro tunc* waiver amendments are included in the appendix to this advisory. Another option is to file a new Form I-192 as a *nunc pro tunc* waiver request, but that would require paying the filing fee or requesting a fee waiver.

Practice Tip: Remember that waivers of inadmissibility under INA §212(d)(14) and (d)(3)(A) are discretionary, so applicants should include evidence of their positive equities and explain why they failed to request a waiver for those grounds in their U visa application.

USCIS rarely issues a notice of the decision on the *nunc pro tunc* waiver. Rather, it typically issues a decision on the adjustment of status application and only addresses the *nunc pro tunc* waiver if denying the adjustment application. To find out whether USCIS has retroactively approved the waiver, practitioners may wish to file a FOIA request, as the officer may place a memorandum or note in the file. A *nunc pro tunc* approval of the waiver should remedy the unlawful U nonimmigrant admission and ensure that the adjustment of status is lawful.

USCIS Denies the Form I-485 on the Basis That the Applicant Is Ineligible for Adjustment of Status

In some cases, USCIS has taken the position that the Form I-192 cannot be retroactively amended where the U visa has already been granted. Then, because USCIS also requires a lawful admission in U nonimmigrant status in order to adjust status under INA §245(m), the agency will deny the adjustment application.

Practitioners should argue that like the Board of Immigration Appeals, USCIS does have authority to grant a nonimmigrant waiver of inadmissibility *nunc pro tunc*. In fact, the Board has frequently granted relief *nunc pro tunc*, such as 212(h) waivers for returning permanent residents and requests for permission to apply for admission after removal.¹⁵

Issue 2: After Receiving the U Visa, the Applicant Accrues One or More New Grounds of Inadmissibility

This problem arises when individuals trigger new grounds of inadmissibility *after* they have received their U visa but *before* USCIS has adjudicated their U-based adjustment application. For example, two years after one author's client received a U visa as a domestic violence victim, she smuggled her minor child into the United States as a result of threats to the child's safety and

¹⁵ See, e.g., *Matter of P*, 8 I&N Dec. 302 (BIA 1959) (granting *nunc pro tunc* waiver of inadmissibility under INA §212(d)(3) where respondent failed to disclose Communist Party membership at time of admission); *Matter of Sanchez*, 17 I&N Dec. 218, 218 (BIA 1980) (granting *nunc pro tunc* waiver under INA §212(h)); *Matter of Garcia*, 21 I&N Dec. 254 (BIA 1996) ("Immigration Judges and this Board have long considered such requests for [*nunc pro tunc* permission to reapply for admission] [where] the grant would effect a complete disposition of the case").

delays in securing his lawful admission to the United States through consular processing. As noted above, U visa holders are not required to demonstrate their admissibility when applying to adjust their status pursuant to INA §245(m).¹⁶ Thus, when the U visa holder applies to adjust her status, there is no need—and, indeed, no mechanism—for USCIS to waive her smuggling ground of inadmissibility, and the existence of the unwaived ground of inadmissibility will not preclude the woman’s adjustment.

However, the new ground of inadmissibility may (and very likely will) factor into USCIS’s determination as to whether discretion should be exercised in the woman’s favor.¹⁷ Per the regulations, where new grounds of inadmissibility and other adverse factors are present at the adjustment stage, the applicant may “offset” them “by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate.”¹⁸ Depending on the nature and severity of the adverse factors, “the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely usual hardship.”¹⁹

In light of this regulatory framework, when advocates face new grounds of inadmissibility (and/or other adverse factors) at the adjustment stage, they should consider taking the following steps:

- Tie the new ground of inadmissibility or other adverse factor(s) to the applicant’s victimization and/or cooperation with law enforcement. Though such a showing is not legally required, it can serve as a strong mitigating equity. Thus, in the example of the U visa holder who smuggled her minor child in the U.S., the advocate might want to explore, for example, whether the child was at risk of harm at the hands of the abuser who committed the qualifying crime against the mother, whether the child was unable to complete consular processing because the abuser refused to consent to the child obtaining a passport or leaving the home country, and so on.
- Provide ample evidence of the positive discretionary factors that existed when USCIS last heard from the applicant (whether in the initial U visa filing or in response to an RFE), as well as any new equities the applicant has accrued since then. Practitioners should pay particular attention to factors related to the humanitarian grounds, family unity, and public interest in the client’s case.²⁰ In brief, practitioners should create a record of all the good things the applicant has done, such as volunteering at a place of religious worship, helping neighbors, and/or doing anything else that shows the applicant’s generosity and value to the community. Think creatively.
- Address and provide evidence of the humanitarian considerations and disruption to family unity that will result if USCIS denies the adjustment application. While it is not necessary to demonstrate extreme hardship, it may be helpful to review the USCIS Policy Manual

¹⁶ 8 CFR §245.24(d)(11).

¹⁷ 8 CFR §245.24(d)(11).

¹⁸ 8 CFR §245.24(d)(11).

¹⁹ 8 CFR §245.24(d)(11). The regulations provide that “USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.” *Id.*

²⁰ *See* INA §245(m)(1)(B).

chapter entitled “Extreme Hardship Considerations and Factors.”²¹ In addition, although it is also not necessary to tie the extreme hardship to the applicant’s victimization or cooperation with law enforcement, it may also be helpful to review 8 CFR §214.11(i)(2), which provides a nonexclusive list of factors USCIS considers when determining whether the removal of a T visa applicant would result in extreme hardship involving unusual and severe harm; many of these factors are tied to the T visa applicant’s trafficking and cooperation.²²

- Where the new ground of inadmissibility or other adverse factor is particularly severe, practitioners should anticipate that USCIS will issue an RFE and should plan accordingly. For example, rather than provide all positive discretionary and hardship evidence concurrently with the adjustment application, practitioners may choose to withhold some evidence in anticipation of providing it in response to an RFE. In the alternative, practitioners may encourage clients to obtain additional evidence of their positive equities while the application remains pending.

Issue 3: When adjudicating the adjustment application, USCIS revisits grounds of inadmissibility and/or negative discretionary factors that the U visa holder previously addressed in the U visa petition

It has become increasingly common for USCIS to issue Requests for Evidence (RFEs) and Notices of Intent to Deny (NOIDs) and to deny U-based adjustment applications based on grounds of inadmissibility and/or other negative discretionary factors that the U visa holder previously disclosed and addressed in the underlying U visa petition. For example, at the adjustment stage, USCIS now often issues RFEs requesting arrest records and other documentation underlying arrests and/or convictions that were already disclosed, addressed, and even waived at the U visa stage. In justifying such RFEs, USCIS often takes the position that it is appropriate for the agency to apply greater scrutiny in its adjudication of immigrant petitions (*i.e.*, the I-485), as opposed to temporary nonimmigrant petitions (*i.e.*, the I-918 and I-192).

When USCIS places applicants in the position of re-litigating grounds of inadmissibility and/or other negative discretionary factors that were already addressed in the U visa petition, practitioners should make the legal argument that USCIS is abusing its discretion. For example, practitioners can argue that the standard at INA §245(m) (“humanitarian grounds, family unity, or public interest”) is more generous than that of §212(d)(14) (“public or national interest”), so it would be arbitrary to grant a waiver under the stricter standard but deny adjustment under the more generous standard based on the same facts.

When USCIS requests arrest reports and other records underlying an arrest, charge, or conviction that was already addressed at the U visa stage, practitioners should determine on a case-by-case basis whether the benefits of complying with the RFE and providing the requested records outweigh the risks that USCIS will use the content of the records to deny the adjustment application as a matter of discretion. When practitioners determine that it is in their client’s best interests to disclose such records, practitioners should make and preserve the argument that the records are of

²¹ USCIS Policy Manual, Vol. 9, Part B, Chapt. 5 (March 30, 2021), available at www.uscis.gov/policy-manual/volume-9-part-b-chapter-5.

²² 8 CFR §214.11(i)(2).

limited evidentiary value – particularly in the absence of a conviction.²³ Finally, practitioners should take the steps outlined with respect to Issue 2 above.

In the adjustment of status context, the issue is no longer one of inadmissibility but of discretion. All adjustment applications should contain some evidence of discretion, and more if there is criminal history or issues of admissibility. Even if the criminal history occurred before the U visa was granted, and even if a waiver was granted for the ground of inadmissibility, you still need to present evidence of discretion to overcome these negative factors at the adjustment stage.

²³ See, e.g., *In re Arreguin De Rodriguez*, 21 I&N Dec. 38, 42 (BIA 1995) (“[W]e are hesitant to give substantial weight to an arrest report, absent a conviction or corroborating evidence of the allegations contained therein.”).

APPENDIX:

SAMPLE AMENDMENTS FOR FORM I-192

List of Amendments to Form I-192

Name: Mary Wellington

A number: 999-999-999

Receipt number of Form I-192: EAC111111111111

Page 4, Part 2 [Immigration and Criminal History], Item 26:

Do you believe that you may be inadmissible to the United States?

Amended response:

I believe that I am inadmissible under INA §212(a)(6)(E)(i) [smuggling] because when I entered the United States in May 2010, I brought my 4 year old daughter with me. We crossed the border without going through the immigration checkpoint. I apologize for breaking the law by bringing my daughter. At the time, I was fleeing to the United States in order to escape my violent ex-partner, as I previously described in my U visa declaration. I felt that I had to bring my daughter because there was no one available to care for her in Mexico, and I was afraid that my ex-partner would harm her if she remained there without my protection.

At the time that I submitted my U visa application in 2013, I did not understand that bringing my daughter to the United States was considered smuggling, so I did not request a waiver of that ground in my original waiver application and also mistakenly responded “no” to Page 4, Part 3, Item 4.c [“Have you EVER knowingly encouraged, induced, assisted, abetted, or aided any alien to try to enter the United States illegally?”]. I apologize for the error and am submitting this amendment to correct my application and request a waiver.

Client’s signature

Date

**UNITED STATES DEPARTMENT OF HOMELAND SECURITY
UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES**

In re:)
)
)
Petition for U Nonimmigrant Status on)
Form I-918 (EAC1111111111))
)
-and-)
)
Application for Advance Permission to)
Enter as a Nonimmigrant on Form I-192)
(EAC1111111112))
)
-of-)
)
Jane DOE)
(A #999-999-999))
_____)

SUPPLEMENTAL AFFIDAVIT OF JANE DOE

STATE OF NEW YORK)
) ss.:
COUNTY OF BRONX)

Jane Doe, being duly sworn, says:

1. My name is Jane Doe, and I was born on October 19, 1980 in Oaxaca, Mexico. On October 10, 2019, I filed a Petition for U Nonimmigrant Status on Form I-918 (EAC1111111111) (“U-Visa Petition”) and an Application for Advance Permission to Enter as a Nonimmigrant on Form I-192 (EAC1111111112) (“Form I-192”). I provide this supplemental affidavit to amend my U-Visa Petition and Form I-192.

A. Amendment to My U-Visa Petition

2. I answered “No” in response to the question in my U-Visa Petition regarding whether I have ever, by fraud or willful misrepresentation of a material fact, sought to procure or procured a visa or other documentation for entry into the United States or any immigration benefit (Part 3, Question 16). After speaking to my new *pro bono* attorney, Anne Attorney, I now understand that my answer to this question should have been “Yes.”

3. As I explained in the affidavits I submitted in support of my U-Visa Petition and Form I-192, I entered the United States without inspection in 2002 by crossing the U.S./Mexican border by car. Afterwards, I began dating a man named John Doe. In October of 2004, when I

was eight month pregnant with John’s baby, men broke into our apartment while John and I were sleeping. One of the men killed John by shooting him as he lay next to me, asked me where the money was, and then hit me in the head, knocking me unconscious.

4. About two weeks after this incident, I gave birth to John’s and my son, James. James is a U.S. citizen. When James was eight years old, I decided to return with him to Mexico because I felt alone in the United States and missed my family.

5. In late 2018, when James was fourteen years old and we were living in Mexico, he told me that he wanted to return to the United States, and that he planned to go with or without me. I was worried about my son, didn’t want to be separated from him, and didn’t want him to live alone in the United States – where I was still terrified of the men who killed his father. I felt that I had no choice but to respect James’s wishes and move with him to the United States.

6. Because James is a U.S. citizen, he was able to travel to the United States with his U.S. passport. In order for me to travel to the United States, however, I needed to obtain a visa.

7. My recollection is that I applied for a tourist visa and attended an interview with an officer at the U.S. Consulate. Although the interview was many years ago, I believe the officer asked me, among other things, whether I had ever been to the United States before and whether any of my children lived in the United States. Even though I had previously lived in the United States, my recollection is that I told the officer that I had never been to the United States. I believe I also told the officer that I didn’t have any children in the United States, even though one of my daughters lived in Minnesota and was a naturalized U.S. citizen. My recollection is that I also told the officer that I only wanted to visit the United States when I actually intended to live there with James.

8. I am very sorry that I made these misrepresentations to the officer. I only did so because I didn’t want my son to travel to or live in the United States without me.

9. When I completed my U-Visa Petition in 2019, I don’t remember my attorneys asking me the question about whether I had ever, by fraud or willful misrepresentation of a material fact, sought to procure or procured a visa or other documentation for entry into the United States or any immigration benefit. It’s possible that my attorneys did ask me this question and that I just didn’t understand them. Either way, had I understood my attorneys to ask me whether I made any misrepresentations in connection with my visa application, I would have answered them honestly.

10. I didn’t intend to mislead the U.S. Citizenship and Immigration Services (“USCIS”). I am very sorry for the confusion I’ve caused and I sincerely hope that I can be forgiven.

B. Amendments to My Form I-192

11. In the affidavit I filed in support of my Form I-192, I asked that USCIS waive my inadmissibility under INA §212(a)(7)(B) due to my lack of a valid passport. I understand that I may also be inadmissible to the United States because:

- a. in 2012, I departed from the United States after I had accrued more than one year of unlawful presence in the United States, and USCIS may therefore determine that I am subject to the 10-year bar (INA §212(a)(9)(B)); and
- b. USCIS may also determine that I sought or procured admission to the United States in 2018 by willfully misrepresenting a material fact (INA §212(a)(6)(C)(i)).

12. As I explained in my prior affidavit in support of my Form I-192, I am terrified to return to Mexico and want to continue living in the United States. After John's murder, I received threatening messages on my social media account from a person living in Mexico. In the United States, I know that I can depend on the police and court system for my protection. However, in Mexico, I fear that the police would not help me.

13. I also fear that if I am forced to return to Mexico, I will be separated from my son, James. James is currently studying computer science in community college. I am very proud of him and know that he will have a very bright future in this country. We continue to live together, we have a wonderful relationship, and we have finally found stability after John's murder. As a result of the murder, I am still afraid to live alone, but I would have no one to live with me in Mexico. I want to stay in the United States so James and I may continue rebuilding our lives. Thank you again for your consideration.

Wherefore, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Jane Doe