Introduction to Survivor-Based Immigration Relief

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This resource[1] provides an introduction to some of the immigration remedies that are available to survivors of gender-based violence. It is an introduction only and is not a substitute for independent legal research and analysis. This resource includes an appendix of commonly used immigration terms at the end of the document.

Survivor-based immigration relief is available to certain noncitizens based on their victimization. It is available in multiple forms, including in removal proceedings before an Immigration Judge ("IJ"), and in visa applications made directly to United States Citizenship and Immigration Services ("USCIS"). The immigration relief ranges from deferred action to permanent resident status and early naturalization.

In this resource, we review the basics of survivor-based immigration relief in two sections. Section I surveys immigration options available to noncitizens who are married, or the children or parent, of an abuser who is a U.S. citizen ("USC") or lawful permanent resident ("LPR"). Section II surveys immigration options available to noncitizens regardless of the relationship of the survivor to the abuser or the abuser's immigration status.

I. Immigration protections that require a certain relationship with the perpetrator

This section reviews the immigration options available to noncitizen survivors based on their relationship to the abuser, and the abuser's immigration status. The options reviewed in this section include VAWA self-petitions, VAWA cancellation of removal, battered spouse and child waivers, and work permits for certain abused spouses of nonimmigrant visa holders. In order to establish eligibility for these forms of relief, the survivor must provide sufficient evidence of the qualifying relative's USC or LPR (or former USC or LPR) status for the adjudicator to verify their status. For more information on how to prove an abuser's immigration status, please see the VAWA Self-Petition Policy Updates Practice Advisory.

A. VAWA Self-Petition

VAWA Self-Petitions are filed with USCIS on Form I-360. Their purpose is

[1] ASISTA thanks the Asian-Pacific Institute on Gender-Based Violence ("API-GBV") for their contributions to this resource.

to allow certain noncitizen survivors of domestic violence to file their own petitions for LPR status without the cooperation of their abusive relative. VAWA Self-Petitions are for noncitizens who were abused by a current or former USC or LPR spouse or parent,[2] as well as noncitizen parents who were abused by adult USC sons or daughters.[3] Parents of abusive LPR sons and daughters are not eligible to file VAWA Self-Petitions.[4]

This resource will first discuss the different qualifying relationships for a VAWA Self-Petition. It will then examine the remaining requirements for VAWA Self-Petitions and the rules for derivative children. For additional detail on the eligibility criteria discussed in this section, please consult the VAWA Self-Petition Policy Updates Practice Advisory.[5]

1. VAWA Self-Petition Qualifying Relationships

a. VAWA Self-Petition based on marriage

With one exception for "intended spouses"[6], a VAWA Self-Petitioner who has filed based on marriage to an abusive USC or LPR must prove that the marriage was legal in the place where it occurred.[7] For information on "intended spouses" and how to prove a qualifying spousal relationship for a VAWA Self-Petition, please review the VAWA Self-Petition Policy Updates Practice Advisory.

b. VAWA Self-Petitions for abused children of USCs and LPRs

For immigration purposes, a "child" must be under 21 and unmarried.[8] Therefore, generally a VAWA self-petitioning child must be under 21 when the self-petition is filed.[9] INA § 101(b)(1) defines a "child" as:

1. A biological child;

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[2] *See* INA §§ 204(a)(1)(A)(iii)(I) (spouses of USCs), 204(a)(1)(B)(ii)(I) (spouses of LPRs), 204(a)(1)(A)(iv) (children of USCs), and 204(a)(1)(B)(iii) (children of LPRs).
[3] *See* INA § 204(a)(1)(A)(vii)
[4] *See* INA § 204(a)(1)(A)(vii) (no provision for self-petitioning for abused parents of LPR sons/daughters).
[5] VAWA Self-Petition Policy Updates Practice Advisory (June 2022)
[6] *See* INA §§ 204(a)(1)(A)(iii)(II)(aa)(BB) (intended spouse of USC), 204(a)(1)(B)(ii)(II)(aa)(BB) (intended spouse of LPR).
[7] *See Matter of H-*, 9 I&N Dec. 640, 641 (BIA 1962) ("The general rule is that the validity of a marriage is determined by the law of the place where it is contracted or celebrated; if valid there, it is valid everywhere.").
[8] INA § 101(b)(1).
[9] There is an exception that allows some noncitizens who are under 25 to file VAWA self-petitions as "children". For more information on this exception, *see* INA § 204(a)(1)(D)(v) and 3 USCIS-PM D.3(G)(1).

2. An adopted child; or
3. A stepchild.[10]

Are all abused adopted children of USCs and LPRs eligible to file VAWA Self-Petitions?

No. Generally, to be eligible to file a VAWA Self-Petition, an abused adopted child must have been under 16 when their abusive USC or LPR parent adopted them.[11]

Are all abused stepchildren of USCs and LPRs eligible to file VAWA Self-Petitions?

No. To qualify as an abused "stepchild" of a USC or LPR stepparent, the abused stepchild's legal parent must have married the abusive USC or LPR stepparent before the abused stepchild turned 18.[12]

- Example: Sammy is 19 years old and unmarried. Sammy's biological mother married Rita when Sammy was 14 years old. Rita has abused Sammy during her marriage to Sammy's biological mother. Sammy is eligible to file a VAWA Self-Petition based on Rita's abuse because: 1) Sammy is under 21 and unmarried, 2) Rita married Sammy's biological mother when Sammy was under 18, and 3) Rita abused Sammy during her marriage to Sammy's biological mother.

For information on how to prove a qualifying relationship for a VAWA Self-Petition by an abused child, please see the VAWA Self-Petition Policy Updates Practice Advisory.

c. VAWA Self-Petitions for abused parents of USC sons and daughters

For an abused parent to qualify for a VAWA Self-Petition, the USC son or daughter must be at least 21 at the time of the abuse and at the time the noncitizen parent files their VAWA Self-Petition.[13] Further, the abusive USC

[10] *See generally* INA § 101(b).
[11] *See* INA § 101(b)(1)(E)(i). Note that some siblings of children who were adopted under age 16 may also be eligible if the first-adopted sibling meets certain criteria and if the later-adopted sibling was adopted when the later-adopted sibling was under age 18. Please review INA § 101(b)(1)(E)(ii) if your client is in this situation.
[12] *See* INA § 101(b)(1)(B).
[13] *See* 3 USCIS-PM D.2(B)(4) (abusive son/daughter must be 21 or older at the time the parent's VAWA Self-Petition is filed) (citing *Matter of Hassan*, 16 I&N Dec. 16 (BIA 1976)), 3 USCIS-PM D.2(A) (abuse must have occurred during the qualifying relationship. In the case of a self-petition filed by an abused parent, the "qualifying relationship" is when the son/daughter was at least 21 years old).

son or daughter must have qualified as the "child" of the self-petitioning parent before they turned 21.[14] Therefore, practitioners should review INA §§ 101(b)(1)-(2) to determine whether a parent/child relationship existed between the survivor and the abusive son or daughter before the son or daughter turned 21.

Who is a self-petitioning "parent"?

1) A biological parent;
2) A stepparent; or
3) An adoptive parent.[15]

Self-petitioning stepparent

The rules for stepparent self-petitions are similar to those for stepchild self-petitions. An abused stepparent may self-petition if they married the abusive U.S. citizen stepson or stepdaughter's legal parent before the stepson or stepdaughter turned 18.[16]

- Example: Tina is married to Jorge. Jorge's biological son Pablo is a U.S. citizen. Pablo was 17 when Tina and Jorge married. Pablo is now 22 years old. Pablo has abused Tina continuously since he was 20 years old. Tina is eligible to file a VAWA Self-Petition based on Pablo's abuse because: 1) Pablo was under 18 when Tina married his biological father, and 2) At least some of the abuse occurred when Pablo was over 21.

Adoptive parent

The survivor parent must have adopted the abusive son or daughter before they turned 16, and the abusive son or daughter must have been in the legal custody of and resided with the survivor parent for at least two years.[17]

For information on how to prove a qualifying relationship for a VAWA Self-Petition by an abused parent, please see the VAWA Self-Petition Policy Updates Practice Advisory.

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[14] *See* INA § 101(b)(2) (definition of "parent" for immigration purposes only applies if the relationship is created under the guidelines in INA § 101(b)(1) (definition of child); *Matter of Hassan*, 16 I&N Dec. 16, 23 (BIA 1976). *Cf.* INA § 201(b)(2)(A)(i) (a noncitizen parent of a U.S. citizen is only considered an "immediate relative" if the U.S. citizen is at least 21 years old).

[15] *See* INA § 101(b)(2) (cross-referencing INA §§ 101(b)(1)).

[16] *See id.*

[17] *Cf.* INA §§ 101(b)(1)(E) and (b)(2) ("parent" status is only acquired through establishment of a relationship described in § (b)(1). The relaxation of the legal custody and residence requirements in the definition of "adopted child" only apply if the child was subjected to battery or extreme cruelty, not if the parent was subjected to battery or extreme cruelty).

A note on stepparents/stepchildren and divorce:

In February 2022, USCIS announced that it will allow stepparents and stepchildren to file VAWA Self-Petitions even after the marriage that created the step-relationship ends in divorce.[18] Here is an example that illustrates USCIS's new policy:

Example

Eun is 18 years old and unmarried. Eun's biological mother Ae Ri was married to Gregory, a U.S. citizen. Ae Ri and Gregory married when Eun was 10 years old. They divorced last year. Gregory abused Eun while he was married to Ae Ri. Eun is eligible to file a VAWA Self-Petition based on Gregory's abuse because Ae Ri married Gregory when Eun was under 18, Gregory abused Eun during his marriage to Ae Ri, and Eun is under 21 and unmarried. Gregory and Ae Ri's divorce does not cut off Eun's eligibility for a VAWA Self-Petition, so long as Eun meets the other eligibility criteria.

2. Other VAWA Self-Petition requirements

a. The self-petitioner resides in the U.S. or qualifies for an exception

Some survivors who live outside the U.S. are eligible for VAWA Self-Petitions:

i. Spouses, intended spouses, and children of USCs or LPRs who are U.S. government employees[19];

ii. Spouses, intended spouses, and children of USCs or LPRs who are "member[s] of the uniformed services"[20]; or

iii. Spouses, intended spouses, and children of USCs or LPRs who were abused by the USC or LPR in the United States.[21]

b. The self-petitioner resides or resided with the abuser

The survivor must demonstrate that they lived with the abuser at some time

[18] *See* 3 USCIS-PM D.3(A)(2).
[19] *See* INA §§ 204(a)(1)(A)(v)(I)(aa) (USC abuser), 204(a)(1)(B)(iv)(I)(aa) (LPR abuser).
[20] *See* INA §§ 204(a)(1)(A)(v)(I)(bb) (USC abuser), 204(a)(1)(B)(iv)(I)(bb) (LPR abuser).
[21] *See* INA §§ 204(a)(1)(A)(v)(I)(cc) (USC abuser), 204(a)(1)(B)(iv)(I)(cc) (LPR abuser). Abuse to the self-petitioner's child is also considered qualifying abuse for a VAWA self-petition under this section. *See id*.

in the past.[22] It is not necessary that the survivor lives with the abuser at the time of filing.[23] As of February 2022, it is also not necessary for the survivor to live with the abuser in the U.S. or during the qualifying relationship.[24] The USCIS Policy Manual contains examples of evidence self-petitioners can submit to prove joint residence with the abusive relative. For more information on residency rules, please see the VAWA Self-Petition Policy Updates Practice Advisory.

c. Victim of battery or extreme cruelty by the qualifying relative during the qualifying relationship.[25]

"Battery or extreme cruelty" includes physical abuse, sexual abuse, and "psychological" abuse.[26] The survivor is not required to demonstrate physical abuse to qualify for a VAWA Self-Petition.[27] USCIS has stated that "isolation"; "degradation"; "coercion"; and "threats of deportation" may be considered examples of extreme cruelty.[28] For more information on proving battery or extreme cruelty, please review the VAWA Self-Petition Policy Updates Practice Advisory.

There is no requirement for a survivor to prove abuse with "systems evidence," such as police reports or court records.[29] Further, there is no requirement for VAWA Self-Petitioners to call the police or obtain a protective order to qualify.[30] If the survivor did call the police or obtain a protective order, the regulations encourage the survivor to submit documents proving those actions with their self-petition.[31] A VAWA Self-Petition cannot "be denied for failure to submit a particular piece of

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[22] INA §§ 204(a)(1)(A)(iii)(II)(dd) (spouse/former spouse/intended spouse of USC), 204(a)(1)(A)(iv) (child of USC), 204(a)(1)(B)(ii)(II)(dd) (spouse/former spouse/intended spouse of LPR), 204(a)(1)(B)(iii) (child of LPR), 3 USCIS-PM D.2(F).
[23] *See id*.
[24] *See* 3 USCIS-PM D.2(F).
[25] See 3 USCIS-PM D.2(A).
[26] See 8 CFR § 204.2(c)(1)(vi).
[27] *See id*.
[28] See 3 USCIS-PM D.2(E)(1).
[29] *See* INA § 204(a)(1)(J) (USCIS must "consider any credible evidence" when adjudicating self-petitions filed by abused spouses/former spouses/intended spouses and children of USCs and LPRs), 8 CFR § 204.2(c)(2)(iv) ("Evidence of abuse may include, but is not limited to, reports and affidavits from police, judges and other court officials…Other forms of credible relevant evidence will also be considered."), 3 USCIS-PM D.2(E)(2). USCIS's position is that the "any credible evidence" standard applies to "self-petitioners", presumably including self-petitioning parents of abusive USC sons and daughters even though this group of self-petitioners are not included in the "any credible evidence" statute. *See* 3 USCIS-PM D.5(B)(2) ("an officer must consider any credible evidence a self-petitioner submits to establish eligibility.").
[30] *Cf. id*.
[31] *See* 8 CFR § 204.2(c)(2)(iv).

evidence."[32]

d. Good faith marriage

All VAWA Self-Petitions based on marriage (including current, former, and "intended" marriages) must prove that the survivor's marriage or intended marriage to the abuser was in "good faith."[33] To prove good faith marriage, the self-petitioner must show "that at the time of the marriage, they intended to establish a life together" with the abuser.[34]

- When evaluating whether a marriage was in good faith, USCIS looks at the self-petitioner's intent.[35] Further, separation from the abuser does not automatically preclude VAWA Self-Petition eligibility, as long as the self-petitioner can show that, at the time of the marriage, they intended to start a life with their spouse.[36]

For information on how to prove good-faith marriage, please review the VAWA Self-Petition Policy Updates Practice Advisory.

e. Good moral character ("GMC")

The final eligibility requirement for a VAWA Self-Petition is "good moral character."[37] In their discussion of GMC evidence, the regulations state that VAWA Self-Petitioners "should" submit, in addition to their affidavit, "a local police clearance or a state-issued criminal background check" for every area they have lived for at least six months during the three years "immediately preceding the filing of the self-petition."[38] However, USCIS stated that a VAWA Self-Petition cannot be denied for failure to submit such evidence if the self-petitioner states in an affidavit that they "have never been arrested."[39]

Although there is no statutory definition of GMC, INA § 101 (f) sets forth

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[32] *See* 3 USCIS-PM D.5(B)(2).
[33] *See* INA §§ 204(a)(1)(A)(iii), 204(a)(1)(B)(ii).
[34] *See* 3 USCIS-PM D.2(C).
[35] *See* INA §§ 204(a)(1)(A)(iii)(I)(aa) ("the marriage or the intent to marry the United States citizen was entered into in good faith **by the** [**noncitizen**]") (emphasis added), 204(a)(1)(B)(ii)(I)(aa) ("the marriage or the intent to marry the lawful permanent resident was entered into in good faith **by the** [**noncitizen**]") (emphasis added).
[36] *Cf.* 3 USCIS-PM D.2(C).
[37] *See* INA §§ 204(a)(1)(A)(iii)(II)(bb), 204(a)(1)(A)(iv), 204(a)(1)(A)(vii)(II), 204(a)(1)(B)(ii)(II)(bb), 204(a)(1)(B)(iii).
[38] 8 CFR § 204.2(c)(2)(v).
[39] 3 USCIS-PM D.2(G)(3).

several statutory bars to establishing GMC.[40] Despite having favorable equities and meeting other criteria, an applicant subject to a GMC bar does not qualify for a VAWA Self Petition. Some GMC bars are permanent, but many are "conditional", meaning they only bar a showing of GMC during the relevant time period.[41] Conditional bars to good moral character include giving false testimony to obtain an immigration benefit[42] and confinement to "a penal institution" due to conviction for at least 180 days in the aggregate.[43]

The permanent bar to GMC that is most likely to apply to a VAWA Self-Petitioner is an aggravated felony conviction.[44] Despite the name, a crime does not need to be "aggravated" or a "felony" to be considered an "aggravated felony." Aggravated felonies are defined at INA § 101(a)(43).

When an immigrant survivor is involved in criminal proceedings, it is imperative that their criminal defense attorney consult with an immigration expert immediately. Without appropriate counsel, the survivor could admit to allegations that may make them ineligible for VAWA and lead to removal.

While an immigration-safe criminal court disposition should be obtained whenever possible, some survivors may still be eligible for a VAWA Self-Petition if they can show that a conditional bar to GMC is "waivable" and "connected to" the abuse.[45] The Third Circuit Court of Appeals held that "connected to" "means "having a causal or logical relationship.""[46] USCIS has implemented this interpretation of "connected to" nationwide.[47]

For more information on GMC and how a survivor can show a connection between the abuse and a conditional bar to GMC, please review the VAWA Self-Petition Policy Updates Practice Advisory.

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[40] *See* INA § 101(f).
[41] *See* INA § 101(f) (unless otherwise indicated, the bars listed in the statute bar a showing of good moral character "during the period for which good moral character is required to be established").
[42] *See* INA § 101(f)(6).
[43] *See* INA § 101(f)(7).
[44] *See* INA § 101(f)(8). The other permanent bars to GMC are participation in Nazi persecution before and during World War II, participation in genocide, or commission of torture or extrajudicial killing; and being "responsible for or directly carr[ying] out" "particularly severe violations of religious freedom" "while serving as a foreign government official". *See* INA § 101(f)(9) (cross-referencing INA §§ 212(a)(3)(E) and 212(a)(2)(G)).
[45] *See* INA § 204(a)(1)(C). The statutory waiver only applies to spouses/intended spouses/former spouses and children of USCs and LPRs. However, USCIS appears to apply the waiver to abused parents of USC sons and daughters as well. *See* 3 USCIS-PM D.2(G)(4) ("If a self-petitioner has committed an act or has a conviction that falls under a conditional bar under INA 101(f), then the officer must consider the following…[criteria enumerated at INA § 204(a)(1)(C)]").
[46] *Da Silva v. Attorney Gen.*, 948 F.3d 629, 636 (3d Cir. 2020).
[47] *See* *Policy Alert: Violence Against Women Act Self-Petitions*, USCIS (Feb. 10, 2022).

3. VAWA Self-Petition derivative children

Abused spouses, abused intended spouses, and children of abusive USCs and LPRs can include their children as "derivatives" in their VAWA self-petitions.[48] Abused parents of USC sons or daughters are not eligible to include derivatives in their self-petitions.[49] A survivor includes a derivative child in their self-petition by listing the child on the self-petition. It is not necessary to file a separate self-petition for the derivative child.[50]

Derivative children must be under 21 and unmarried when the survivor files the self-petition.[51] The derivative children also must be unmarried at the time the self-petition is approved.[52] A derivative child will not "age out" if they turn 21 after the self-petition is filed.[53]

4. What happens when a VAWA Self-Petition is approved?

An approved VAWA self-petitioner and their derivative children are eligible for work permits and deferred action.[54] "Deferred action" means the immigration authorities have made an administrative decision to consider the noncitizen a lower priority for removal.[55] Under the current administration's policies, approved VAWA self-petitioners and their derivative children have additional protection from removal in many circumstances.[56]

If a VAWA self-petition is approved, USCIS issues an approval notice for

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[48] *See* INA §§ 204(a)(1)(A)(ii), 204(a)(1)(A)(iv), 204(a)(1)(B)(ii)(I), 204(a)(1)(B)(iii).
[49] *See* INA § 204(a)(1)(A)(vii) (unlike the provisions for self-petitioning spouses and children, this provision contains no mention of including derivative children).
[50] *See* 8 CFR § 204.2(c)(4).
[51] *Cf.* § 101(b)(1).
[52] *See* 8 CFR § 103.2(b)(1) (applicant must be eligible for the immigration benefit at the time of filing and at the time of adjudication). Only a "child" is eligible to be a derivative, and a "child" must be unmarried. See INA § 101(b)(1).
[53] *See* INA § 204(a)(1)(D)(i)(III).
[54] *See* INA § 101(a)(51)(A)-(B) ("VAWA self-petitioner" definition includes the child of a noncitizen who has had a petition approved as an abused spouse or child of a USC or LPR), INA § 204(a)(1)(K) (mentions employment authorization "[u]pon approval of a petition as a VAWA self-petitioner"), INA §§ 204(a)(1)(D)(i)(II), 204(a)(1)(D)(i)(IV) (deferred action).
[55] *See*, *e.g.*, *N-N v. Mayorkas*, 540 F. Supp. 3d 240, 249 n. 3 (E.D.N.Y. 2021).
[56] *See* *ICE Directive 11005.3: Using A Victim-Centered Approach with Noncitizen Crime Victims*, ICE (Aug. 10, 2021). Every presidential administration adopts priorities for enforcement of immigration violations and the removal of noncitizens. Currently, the U.S. Supreme Court is considering *U.S. v. Texas*, Docket No. 22-58, which involves the scope of the Biden Administration's authority to prioritize the use of DHS enforcement and detention resources. *See Litigation Tracker*, JUSTICE ACTION CTR. (last visited Dec. 2, 2022), https://litigationtracker.justiceactioncenter.org/cases/usa-v-texas-tx-ice-priorities-supreme-court

the self-petition and a separate notice listing any derivative children who were included on the self-petition. If the approved principal self-petitioner is granted deferred action, USCIS issues an "initial notice of deferred action" for the principal self-petitioner. Derivative children of an approved VAWA self-petitioner must apply for deferred action separately.[57] VAWA deferred action is often initially valid for 15 months and can be renewed thereafter.

B. VAWA-based Adjustment of Status ("AOS")

The approval of the VAWA self-petition is not itself an immigration status, but is the first step for the survivor and their derivative children to become LPRs. Approved self-petitioners and their derivative children are eligible for AOS if they are admissible or if they are eligible for a waiver of inadmissibility.[58]

An applicant for admission or adjustment of status is inadmissible if they meet one of the grounds of inadmissibility in Section 212 of the INA. There are exceptions and waivers of inadmissibility available to approved VAWA self-petitioners who are otherwise eligible to apply for adjustment of status.

1. VAWA adjustment and inadmissibility under INA § 212(a)(6)(A) (Entry without inspection or "EWI")

USCIS's interpretation of the INA is that EWI inadmissibility is waived for VAWA self-petitioners and their derivative children.[59] Noncitizens who arrive in the U.S. without presenting themselves for inspection by U.S. immigration officers are inadmissible for entering without inspection. There is no need to file for a waiver of EWI inadmissibility if the VAWA-based AOS application is filed with USCIS.

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[57] *See* 3 USCIS-PM D.5(C)(2).
[58] *See* INA § 245(a) ("the status of any other [noncitizen] having an approved petition for classification as a VAWA self-petitioner may be adjusted by the Attorney General…").
[59] *See* Michael Aytes, *Memorandum: Adjustment of status for VAWA self-petitioner who is present without inspection* 2, USCIS (Apr. 11, 2008), available at https://asistahelp.org/wp-content/uploads/2018/10/USCIS-Memorandun-Adjusment-of-Status-for-VAWA-EWI-1.pdf.

2. VAWA adjustment and all other grounds of inadmissibility

VAWA Self-Petitioners who are inadmissible for other reasons[60] must request and receive a waiver of inadmissibility to adjust status based on their approved VAWA Self-Petition. These waiver requests are filed on Form I-601. Practitioners should review Section 212 of the INA and ASISTA's chart to determine if their VAWA client is eligible for a waiver that allows them to adjust under INA § 245(a).

3. What if the VAWA self-petitioner is inadmissible and ineligible for a waiver?

Some approved VAWA self-petitioners are ineligible for adjustment under INA § 245(a) because they are inadmissible and ineligible for a waiver. Even though they cannot adjust under § 245(a), these approved self-petitioners remain eligible for employment authorization and deferred action.[61] Many of these self-petitioners also have some protection from removal under the current administration.[62]

Regardless, many self-petitioners understandably desire more permanent immigration status in the United States. These self-petitioners may be able to pursue an alternative avenue to adjustment if they are eligible, such as T or U nonimmigrant status. There are much broader waivers of inadmissibility for T and U nonimmigrants than there are for noncitizens who are adjusting based on an approved VAWA Self-Petition. The approved self-petitioner may also be eligible for VAWA cancellation of removal if they are in removal proceedings.

C. VAWA cancellation of removal

Noncitizen spouses and children of abusive USCs or LPRs who are in removal proceedings may be able to apply for a defense to removal under INA § 240A(b)(2) that is colloquially called "VAWA cancellation of removal"

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[60] VAWA Self-Petitioners are also exempt from the public charge ground of inadmissibility and do not need to submit a waiver for this ground. *See* INA §212(a)(4)(C)(i)(III).

[61] New facts that bar the survivor from establishing good moral character may lead to revocation of the approved VAWA self-petition. *See* 3 USCIS-PM D.6(A). The survivor may also be placed into removal proceedings if they incur new grounds of inadmissibility.

[62] *See ICE Directive 11005.3*, *supra* note 56.

or "VAWA cancellation."[63] A VAWA cancellation applicant is eligible for employment authorization while their cancellation application is pending.[64]

What happens if a VAWA cancellation application is approved?
The applicant's removal is "canceled" and they are adjusted to LPR status.[65] However, only 4,000 noncitizens may have their removal "canceled" and their status adjusted per fiscal year.[66] There may be a significant waiting period between the approval and the actual cancellation of removal and adjustment of status.

Does VAWA cancellation include derivatives?
Unlike VAWA Self-Petitioners, VAWA cancellation applicants cannot include derivatives.[67] However, the INA instructs the Attorney General to grant parole under INA § 212(d)(5) to the following noncitizens upon the applicant's cancellation of removal and adjustment of status:

- All applicants: Applicant's children; and
- Only if the applicant is a child: the applicant's parents.[68]

"Parole" means the noncitizen has permission to temporarily live in, and in some cases, work, in the U.S.[69] These paroled noncitizens are eligible to apply for AOS to the same extent as VAWA self-petitioners.[70] Despite the mandatory statutory language, these noncitizen relatives are rarely granted parole in practice.

1. VAWA cancellation eligibility requirements

VAWA cancellation mirrors the self-petitioning process in some ways, but there are substantial differences between the two processes.

In order to qualify for VAWA cancellation, the applicant must demonstrate:

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[63] *See* INA § 240A(b)(2)(A). Parents of abusive USC adult sons and daughters are not eligible for VAWA cancellation. *See id*.
[64] *See* 8 CFR § 274a.12(c)(10) (the cancellation applicant must affirmatively file an application in order to receive employment authorization).
[65] *See* INA § 240A(b)(2)(A).
[66] *See* INA § 240A(e)(1).
[67] *See generally* INA § 240A(b)(2) (no provision allowing the cancellation applicant to apply for derivatives).
[68] *See* INA § 240A(b)(4)(A).
[69] *See generally* Immigrant Justice Campaign, *Parole from ICE Detention: An Overview of the Law*, Updated April 15, 2020, https://www.aila.org/File/Related/20030201cd.pdf.
[70] *See* INA § 240(A)(b)(4)(B).

a. Qualifying relationship

- Abused by a spouse or parent who is or was a USC or LPR;
- Abused by a USC or LPR who they intended to marry, but the marriage was invalid due to the abuser's bigamy (similar to the VAWA Self-Petition "intended spouse" rule);
- The applicant is the parent of a child of a USC, and the applicant's child has been abused by the USC parent; or
- The applicant is the parent of a child of an LPR or former LPR, and the applicant's child has been abused by the current or former LPR parent.[71]

b. Continuous physical presence ("CPP")

The applicant must have been continuously physically present in the U.S. for at least 3 years immediately preceding the date of the cancellation application.[72]

i. Breaks in CPP: A VAWA cancellation applicant who has departed the U.S. for a single period exceeding 90 days, or who has spent more than 180 days in the aggregate outside the U.S., has broken CPP.[73]

- Exception: A VAWA cancellation applicant has not broken CPP if they can demonstrate "a connection" between battery or extreme cruelty and their absence from the U.S.[74] Similarly, any absence that is "connected to" battery or extreme cruelty will not count toward the 90 or 180 day period.[75]

ii. "Stop-time rule": This rule is found at INA § 240A(d)(1).[76]

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[71] *See* INA § 240A(b)(2)(A)(i)(I)-(III).
[72] *See* INA § 240A(b)(2)(A)(ii).
[73] *See* INA § 240A(d)(2).
[74] *See* INA § 240A(b)(2)(B).
[75] *See* INA § 240A(b)(2)(B).
[76] Unlike other cancellation applicants, the issuance of a Notice to Appear ("NTA") does not stop a VAWA cancellation applicant's period of CPP. *See* INA §§ 240A(b)(2)(A)(ii), 240A(d)(1). However, a VAWA cancellation applicant's commission of an offense that is "referred to in" INA §§ 212(a)(2) and "renders [them] inadmissible" under INA § 212(a)(2) or deportable under INA §§ 237(a)(2) or 237(a)(4) does stop the noncitizen's period of CPP. *See* INA § 240A(d)(1).

c. Good moral character ("GMC")

The applicant must have been a person of GMC for 3 years immediately preceding the date of the cancellation application.[77] The BIA has held that a VAWA cancellation applicant must maintain GMC for "the 3-year period preceding the entry of a final administrative order."[78] The VAWA cancellation GMC waiver is at INA § 240A(b)(2)(C).[79]

i. **Caution:** The VAWA cancellation GMC waiver is much more limited than the GMC waiver for VAWA self-petitioners under INA § 204(a)(1)(C). INA § 204(a)(1)(C) allows waiver of certain bars to GMC for VAWA self-petitioners even if the bars are also grounds of inadmissibility under INA § 212(a)(2).[80] In contrast, the VAWA cancellation GMC waiver is not available for GMC bars that are also grounds of inadmissibility under INA § 212(a)(2).[81] Clients should be advised accordingly.

d. Battery or extreme cruelty

A VAWA cancellation applicant must show that they have been "battered or subjected to extreme cruelty" by their USC or LPR relative.[82] "Battery or extreme cruelty" should have the same meaning

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[77] *See* INA § 240A(b)(2)(iii).

[78] *See Matter of M-L-M-A*, 26 I&N Dec. 360, 363 (BIA 2014). Therefore, a VAWA cancellation applicant who commits an act that bars them from showing GMC while their cancellation application is pending may be disqualified from VAWA cancellation unless they qualify for a waiver.

[79] INA § 240A(b)(2)(C) allows for waiver of a bar to good moral character if all of the following are true: 1) The bar to good moral character does not prevent the Attorney General from granting relief under "subparagraph (A)(iv)" of the VAWA cancellation statute; 2) "the act or conviction" is "connected to" the battery or extreme cruelty; and 3) The Attorney General "determines that a waiver is otherwise warranted." The Third Circuit held that "connected to" "means "having a causal or logical relationship."" *See Da Silva*, 948 F.3d at 636. For an excellent discussion of how this interpretation of the good moral character waiver may benefit survivors, see the Immigrant Legal Resource Center ("ILRC")'s section of the VAWA Self-Petition Policy Updates Practice Advisory (ILRC's section begins on page 24.) While *Da Silva* is binding precedent only in in the Third Circuit for VAWA cancellation purposes, practitioners outside the Third Circuit with VAWA cancellation clients whose good moral character bars are connected to the abuse may wish to review *Da Silva* and make similar arguments for a similar interpretation of "connected to" in their circuit.

[80] *See* INA § 204(a)(1)(C).

[81] *See* INA § 240A(b)(2)(C).

[82] *See* INA § 240A(b)(2)(i).

for VAWA self-petitioning and VAWA cancellation purposes.[83] The battery or extreme cruelty must have occurred when the abusive relative was a USC or LPR.[84] If the abuser was the applicant's spouse, the battery or extreme cruelty also must have occurred during the qualifying relationship.[85]

i. Like a VAWA self-petitioner, there is no requirement for a VAWA cancellation applicant to submit police reports or protection orders as proof of abuse.[86] A survivor may be eligible for VAWA cancellation even if they never called the police or obtained a protection order. The IJ must "consider any credible evidence" that the VAWA cancellation applicant submits to prove battery or extreme cruelty.[87]

e. No aggravated felony conviction and not inadmissible or deportable under certain grounds (or eligible for a waiver)

The applicant cannot be inadmissible under INA §§ 212(a)(2) (criminal and related grounds) or 212(a)(3) ("security and related grounds") or deportable under INA §§ 237(a)(1)(G) (marriage fraud), 237(a)(2) ("criminal offenses"), 237(a)(3) ("failure to register and falsification of documents"), or 237(a)(4) ("security and related grounds").[88] The applicant also cannot have an aggravated felony conviction.[89] A waiver for VAWA cancellation applicants is found at

[83] *Cf*. *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973) ("The similarity of language in § 718 and § 204(b) is, of course, a strong indication that the two statutes should be interpreted *pari passu*. Moreover, "the two provisions share a common *raison d'etre*…The enactment of both provisions was for the same purpose-…We therefore conclude that, as with § 204(b), if other requirements of § 718 are satisfied, the successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."") (italics in original). VAWA self-petitions and VAWA cancellation share the same purpose. *See Matter of L-L-P*, 28 I&N Dec. 241, 247 (BIA 2021) ("Although the VAWA has been amended several times to include a self-petitioning visa provision, special rule cancellation of removal for battered [noncitizens], and an exception to inadmissibility, we recognize that, in enacting all these benefits, one of Congress' goals was to free abused spouses, who are married to United States citizens or lawful permanent residents, from the fear that remaining in an abusive marriage is the only way to obtain lawful immigration status.").

[84] *See L-L-P*, 28 I&N Dec. at 244.

[85] *See id*. at 244-45.

[86] *See generally* INA § 240A(b)(2) (contains no requirement to prove abuse with "systems evidence" such as police reports or protection orders), *see also* INA § 240A(b)(2)(D) (requires the Attorney General to "consider any credible evidence relevant to the application.").

[87] *See* INA § 240A(b)(2)(D).

[88] *See* INA § 240A(b)(2)(iv).

[89] *See id*.

INA § 240A(b)(5).[90]

f. Extreme hardship

The applicant must show that "removal would result in extreme hardship to the" applicant, their child, or their parent.[91] None of these relatives need to have a particular immigration status.[92]

i. Some of EOIR's extreme hardship regulations are particularly relevant to survivors of gender-based violence.[93] Practitioners are encouraged to use the regulations and extreme hardship caselaw to guide client interviews and structure the presentation of evidence and arguments on extreme hardship.

2. Some survivors may be eligible for VAWA cancellation but not a VAWA self-petition

a. Good faith marriage

VAWA cancellation does not have a "good faith marriage" requirement.[94] A survivor who is deportable for marriage fraud is ineligible for VAWA cancellation[95], so practitioners should still screen for this ground. However, a survivor who did not commit marriage fraud but cannot prove "good faith marriage" because of lack of evidence may be eligible for VAWA cancellation if they meet the requirements.

b. "Parent of a child" provision

A critical difference between VAWA self-petitions and VAWA cancellation is that in some cases, parents of abused children can qualify without showing that they were married to or intended to marry the abusive co-parent.

- Example: Mahmoud lives with Miriam, a U.S. citizen. Miriam and Mahmoud have never been married. Miriam and Mahmoud share

[90] *See* INA § 240A(b)(5) ("The authority provided under" INA § 237(a)(7) applies to paragraph (2)(A)(iv) of the VAWA cancellation statute (the paragraph that bars VAWA cancellation eligibility for noncitizens with criminal grounds of inadmissibility or deportability, as well as aggravated felonies)). INA § 237(a)(7) allows a noncitizen who was subjected to battery or extreme cruelty, "and who is not and was not the primary perpetrator of violence in the relationship" to receive a waiver of deportability for crimes of domestic violence, stalking, and violation of a domestic violence protection order, if they meet certain conditions enumerated in INA § 237(a)(7)(A)(i).
[91] *See* INA § 240A(b)(2)(v).
[92] *See id*.
[93] *See* 8 CFR § 1240.58(c).
[94] *See generally* INA § 240A(b)(2) (contains no "good faith marriage" requirement).
[95] *See* INA § 240A(b)(2)(A)(iv).

a child, Sohrab. Miriam abused Sohrab and was a U.S. citizen at the time of the abuse. As long as he meets all of the requirements, Mahmoud is eligible for VAWA cancellation based on Miriam's abuse of Sohrab. It is irrelevant that Mahmoud was never married to Miriam.

3. Some survivors may be eligible for VAWA cancellation but not VAWA adjustment under INA § 245(a)

a. Survivors who are inadmissible under INA §§ 212(a)(9)(B) and/or 212(a)(9)(C)

Inadmissibility under INA §§ 212(a)(9)(B)-(C) ("3/10 year bars" and the "permanent bar") is not a bar to VAWA cancellation even if there is no connection between the abuse and the conduct that caused the ground of inadmissibility.[96] A survivor who is inadmissible under one or both of these grounds is eligible for VAWA cancellation if they meet all of the requirements.

4. Some survivors may be eligible for a VAWA self-petition but not VAWA cancellation

a. Criminal inadmissibility

VAWA cancellation's stricter inadmissibility rules mean that some survivors with criminal grounds of inadmissibility are ineligible for this form of relief.[97] However, these survivors may be eligible for a VAWA self-petition if the criminal ground of inadmissibility is not a statutory bar to GMC or if the survivor is eligible for the more generous VAWA self-petition GMC waiver.[98]

b. Abused parents

An abused parent of a U.S. citizen son or daughter is not eligible for VAWA cancellation[99], but they may be eligible for a VAWA self-petition.[100]

c. Recent arrivals

Survivors who have recently arrived in the U.S. are ineligible for VAWA cancellation because of the 3-year CPP requirement. However, VAWA

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[96] *See* INA § 240A(b)(2)(iv) (these grounds of inadmissibility are not listed as bars to VAWA cancellation).
[97] *Cf*. INA § 240A(b)(2)(A)(iv).
[98] *Cf*. INA § 101(f), 204(a)(1)(C).
[99] *See generally* INA § 240A(b)(2) (lacks an "abused parent" provision).
[100] *See* INA § 204(a)(1)(A)(vii).

self-petition eligibility is not dependent on a survivor's length of residency in the U.S.[101]

D. Battered spouse waiver

The battered spouse waiver is for survivors who have obtained conditional LPR status (a temporary 2-year green card) through an application filed by their abusive USC or LPR spouse. All beneficiaries of marriage-based immigrant visa petitions (irrespective of abuse) who have been married for less than two years at the time of their AOS approval are issued a conditional green card. At the end of the two year conditional residency period, the conditional LPR and their sponsoring relative must file a joint petition to have the "conditions" removed from their LPR status and a green card issued reflecting their permanent LPR status.[102] A conditional LPR who was abused by the sponsoring spouse, however, may petition to have the conditions removed on their permanent residency without the sponsoring abuser's knowledge or participation.[103] A survivor files for this waiver with USCIS on Form I-751.

1. Eligibility for Battered Spouse Waiver

In order to qualify for a battered spouse waiver, the conditional LPR must demonstrate:

a. They were subjected to battery or extreme cruelty by:
    i. The USC or LPR spouse during the marriage[104] (relief is also available if the USC or LPR spouse abused the conditional LPR's child during the marriage)[105]; or
    ii. The USC or LPR "intended spouse" during what the survivor intended to be a marriage[106]; and
b. The survivor entered the marriage or "intended marriage" in good faith.[107]

The adjudicator must "consider any credible evidence" for a battered spouse waiver petitioner.[108]

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[101] *See generally* INA § 204(a)(1)(A)-(B) (lacks a "length of residency" requirement).
[102] *See* INA § 216(c)(1).
[103] *See* INA § 216(c)(4)(C).
[104] *See* INA § 216(c)(4)(C).
[105] *See* 8 CFR § 216.5(e)(3). The abused child's immigration status is irrelevant. *Id*.
[106] *See* INA § 216(c)(4)(C).
[107] *See id*..
[108] *See* INA § 216(c)(4).

Marital status

A conditional LPR who was abused by the sponsoring spouse may apply for a battered spouse waiver even if they are no longer married to the abuser.[109]

Battery or extreme cruelty

Battery or extreme cruelty "includes, but is not limited to, being the victim of any act or threatened act of violence, including any forceful detention, which results or threatens to result in physical or mental injury."[110] "Violence" includes "psychological or sexual abuse or exploitation" and "forced prostitution."[111] There is no need to show that the survivor has suffered physical abuse to qualify for a battered spouse waiver.

The survivor is not required to prove battery or extreme cruelty with "systems evidence".[112] A survivor can qualify for a battered spouse waiver even if they never called the police or obtained a protection order.

When can the survivor file the waiver?

The survivor can file the waiver any time after their conditional LPR status is approved, as long as they have not departed the United States since the termination of their conditional LPR status.[113]

What if the survivor is in removal proceedings?

If a survivor in removal proceedings has shown that they are "prima facie eligible for a waiver under" INA § 216(c)(4), the IJ should grant the survivor a continuance to allow USCIS to adjudicate the waiver petition.[114] If USCIS denies the waiver, the survivor can ask the IJ to review the denial.[115]

What happens if the battered spouse waiver is approved?

The survivor becomes a full permanent resident and receives a green card that is valid for 10 years.

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[109] *See* 8 CFR § 216.5(e)(3)(ii) ("The conditional resident may apply for the waiver regardless of his or her present marital status.").
[110] *See* 8 CFR § 216.5(e)(3)(i).
[111] *See id*.
[112] *See* INA § 212(c)(4)(C) (contains no "systems evidence" requirement and requires the adjudicator to "consider any credible evidence relevant to" the application).
[113] *See* 8 CFR § 216.5(e)(3)(ii).
[114] *See Matter of Stowers*, 22 I&N Dec. 605, 613-14 (BIA 1999) ("As the Board held in *Matter of Mendes*, *supra*, where an [noncitizen] is prima facie eligible for a waiver under section 216(c)(4) of the Act and wishes to have his or her waiver application adjudicated by the Service, the proceedings should be continued in order to allow the Service to adjudicate the waiver application.").
[115] *See* 8 CFR § 216.5(f).

E. Battered child waiver

USCIS allows abused conditional LPR children to file their own petitions to remove conditions on LPR status in the following circumstances:

1. The conditional LPR child's parent entered the marriage with the sponsoring spouse in good faith; and
2. The conditional LPR parent's sponsoring spouse subjected the conditional LPR child to battery or extreme cruelty; or
3. The conditional LPR parent subjected the conditional LPR child to battery or extreme cruelty.[116]

A conditional LPR child whose waiver is approved receives full LPR status and a green card that is valid for 10 years.

F. Naturalization After 3 Years

A survivor whose LPR status is based on battery or extreme cruelty by a USC spouse or parent is eligible to become a U.S. citizen through naturalization 3 years after becoming an LPR.[117] The survivor is not required to show that they are "living in marital union" with the abusive USC spouse in order to naturalize under this provision.[118] Survivors who obtained battered spouse waivers are eligible for naturalization 3 years after approval of their *conditional* LPR status.[119]

G. Work permits for abused spouses of certain nonimmigrant visa holders

Abused derivative spouses of certain nonimmigrant visa holders can obtain

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[116] *See* Form I-751 Instructions, at 1. Form instructions are incorporated into the regulations. *See* 8 CFR § 103.2(a)(1) ("The form's instructions are hereby incorporated into the regulations requiring its submission.").

[117] *See* INA § 319(a) ("any person who obtained status as a lawful permanent resident by reason of his or her status as a spouse or child of a United States citizen who battered him or her or subjected him or her to extreme cruelty, may be naturalized upon compliance with all the requirements of this subchapter except the provisions of paragraph (1) of section 1427(a) of this title if such person immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least three years").

[118] *See* INA § 319(a) ("during the three years immediately preceding the date of filing his application has been living in marital union with the citizen spouse (except in the case of a person who has been battered or subjected to extreme cruelty by a United States citizen spouse or parent")).

[119] *Cf*. INA § 216(e) (for naturalization purposes, a CLPR is considered "lawfully admitted for permanent residence."). Because a CLPR is considered "lawfully admitted for permanent residence" for naturalization purposes, a noncitizen who received a battered spouse waiver based on marriage to an abusive USC is eligible for naturalization under INA § 319(a) three years after admission as a CLPR.

work permits.[120] These survivors apply for employment authorization with USCIS on Form I-765V. To qualify, the derivative spouse must prove that all of the following are true:

1. The "principal" spouse was admitted to the United States on an "A", "E-3", "G", or "H" nonimmigrant visa;

2. The "derivative" spouse was admitted to the United States on an "A", "E-3", "G", or "H" nonimmigrant visa; and

3. During the marriage, the principal spouse subjected the derivative spouse or the derivative spouse's child to battery or extreme cruelty.[121]

Some derivative spouses still qualify for work permits if they are no longer married to the abusive spouse or if the abusive spouse no longer has the appropriate nonimmigrant status. These survivors may still qualify for work permits if:

1. Within 2 years before filing the work permit, their marriage to the principal spouse was terminated, and there was "a connection between the" marriage termination and the battery or extreme cruelty;

2. Within 2 years before filing the work permit, the abusive principal spouse died; or

3. Within 2 years before filing the work permit, the abusive principal spouse lost their status "due to an incident of domestic violence."[122]

USCIS must accept "any credible evidence" of abuse.[123] Abused nonimmigrant spouses are not required to involve the police or the courts in order to obtain work permits under this provision.

Example:

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[120] INA § 106(a).
[121] *See id*. The statute does not require the derivative spouse to have been "last admitted" in one of the above statuses. However, USCIS form instructions do require this. *See* Form I-765V Instructions, at 2.
[122] Form I-765V instructions, page 1.
[123] *Cf*. INA § 106(a) ("Requests for relief under this section shall be handled under the procedures that apply to [noncitizens] seeking relief under section 1154(a)(1)(A)(iii) of this title." (VAWA self-petitioning spouses of USCs)). One of the "procedures" that applies to self-petitioning spouses of USCs is the "any credible evidence" standard at INA § 204(a)(1)(J).

1) Diya is married to Dev. Dev received an "H-1B" visa to work for a tech company in the United States. Dev and Diya were admitted to the United States on H-1B visas (Dev is the principal visa holder.) Dev has abused Diya during their marriage, but Diya never called the police or received a protection order. Diya is currently staying at a domestic violence shelter and she receives counseling from your agency. Diya may qualify for a work permit as an abused spouse of an H-1B nonimmigrant visa holder.

II. Immigration protections that do not depend on the survivor's relationship to the perpetrator

This section surveys the immigration options available to noncitizen survivors without regard to their relationship to the abuser or perpetrator, and without regard to the abuser or perpetrator's immigration status. These options include U Nonimmigrant status and T Nonimmigrant status.

A. U Nonimmigrant Status

U nonimmigrant status is available to victims of certain qualifying crimes who have been helpful, are being helpful, or are likely to be helpful to law enforcement, prosecutors, judges, or other investigative authorities in a criminal investigation or prosecution.[124] A petition for U nonimmigrant status is filed with USCIS on Form I-918.

1. U nonimmigrant status requirements

There are several requirements for obtaining U nonimmigrant status. A noncitizen can apply and be approved for U status from anywhere.

a. Victim

For the noncitizen to be granted U nonimmigrant status, USCIS must determine that the noncitizen was a "victim" of a qualifying crime.[125]

The regulations define a "victim" as "an [noncitizen] who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity."[126] Victims are generally divided into two categories for U status

[124] *See* INA § 101(a)(15)(U)(i)(III).
[125] *See* INA § 101(a)(15)(U)(i)(I).
[126] 8 CFR § 214.14(a)(14).

purposes: “direct” victims and “indirect” victims.

i. Direct victims

Direct victims may include:

1) Individuals against whom the qualifying crime was actually committed.
2) Individuals who were not direct targets of the qualifying crime but who suffered “direct and proximate harm” as a result of the qualifying crime. USCIS frequently resists any designation of individuals who suffered “direct and proximate harm” but who were not the targets of or present at the time of the qualifying crime as “direct victims.”[127] Practitioners should be prepared for a resource-intensive case if they plan to make a “direct and proximate harm” argument, including a potential appeal to the Administrative Appeals Office (“AAO”).
3) Individuals who suffered an “unusually direct injury” as a result of a qualifying crime. These individuals are often known as “bystander” victims. USCIS frequently requires that an individual was present at the time of the qualifying crime in order to qualify as a “bystander” victim, even though there is no such requirement in the statute or regulations.

ii. Indirect victims

Certain family members of “direct” victims who are “deceased due to murder or manslaughter” or are “incompetent or incapacitated” may be “indirect” victims who are eligible for U nonimmigrant status.[128] The “incompetent or incapacitated” victim can be a U.S. citizen.[129]

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[127] For arguments against USCIS’s restrictive interpretation of “victim”, please *see Medina Tovar v. Zuchowski*, 982 F.3d 631 (9th Cir. 2020) (discussion of how “settled” legal language should be interpreted), *Morris v. Nielsen*, 374 F. Supp. 3d 239 (E.D.N.Y. 2019) and the cases cited therein, and ASISTA’s amicus brief on the “direct victim” definition and the cases cited therein. The AAO has approved some “direct victim” cases even when the petitioner was not the targeted victim or present at the time of the qualifying crime. Please see the following potentially helpful AAO decisions: October 22, 2015 (de facto stepdaughter was murdered); January 3, 2020 (adult daughter was murdered); February 5, 2021 (baby was abused); March 19, 2021 (minor brother was murdered); and January 13, 2022 (brother was murdered).

[128] *Cf.* 8 CFR § 214.14(a)(14)(i).

[129] *See U Visa Law Enforcement Resource Guide* 7, USCIS, available at https://www.uscis.gov/sites/default/files/document/guides/U_Visa_Law_Enforcement_Resource_Guide.pdf.

Chart: who can be an indirect victim?[130]

Age of direct victim	Who can be an indirect victim?
Under 21	Spouse, children under 21, parents, and unmarried siblings under 18.
21+	Spouse and children under 21.

The direct victim's age is measured at the time of the qualifying crime.[131]

In addition to establishing the direct victim's age and the required family relationship, the noncitizen who is applying for U status as an indirect victim must also show that the "direct" victim is "deceased due to murder or manslaughter" or is "incompetent or incapacitated."[132] The AAO held that there is a rebuttable presumption that a direct victim who was under 16 at the time of the qualifying crime was incapacitated or incompetent.[133]

b. Qualifying crime

The noncitizen must show that they were the victim of one of the following crimes (or "any similar activity") "in violation of Federal, State, or local criminal law, or of "attempt, conspiracy, or solicitation to commit" one of the following crimes:

- Rape
- Torture
- Trafficking
- Incest
- Domestic Violence
- Sexual Assault
- Abusive Sexual Contact

[130] *See* 8 CFR § 214.14(a)(14)(i).
[131] *See id*.
[132] *See id*.
[133] *See*, *e.g.*, *In re: 10321874*, at 3 (AAO Aug. 16, 2021). Factors the AAO considers when determining whether the "direct" victim was incapacitated or incompetent include the direct and indirect victim's participation in the investigation or prosecution and "the indirect victim's role in supporting the direct victim." *See id*. Practitioners may also consider whether the direct victim had mental health concerns that prevented them from fully cooperating. *Cf. In re: 14519113* (AAO Oct. 5, 2021) (17-year-old direct victim who participated in the criminal investigation was still deemed incompetent or incapacitated. The direct victim had "mental health issues" that were related to the qualifying crime and prevented her from fully assisting law enforcement). Finally, practitioners may consider whether the direct victim otherwise had a disability, and laws in the client's jurisdiction about the competency of minors in legal contexts.

- Prostitution
- Sexual Exploitation
- Stalking
- Female Genital Mutilation
- Being Held Hostage
- Peonage
- Involuntary Servitude
- Slave Trade
- Kidnapping
- Abduction
- Unlawful Criminal Restraint
- False Imprisonment
- Blackmail
- Extortion
- Manslaughter
- Murder
- Felonious Assault
- Witness Tampering
- Obstruction of Justice
- Perjury
- Fraud in Foreign Labor Contracting.[134]

c. Location

The qualifying crime must have occurred in the United States (including "Indian country" and U.S. "military installations"), or in the territories or possessions of the United States.[135] Alternatively, the crime must have "violated a U.S. federal law" and be eligible for prosecution "in a U.S. federal court."[136]

d. Investigation or prosecution

To obtain U nonimmigrant status, there must be an investigation or prosecution conducted by a federal, state, or local law enforcement official, prosecutor, judge, or other authority "investigating or prosecuting" a qualifying crime.[137] "Investigation or prosecution" includes detection of a

[134] INA §§ 101(a)(15)(U)(iii).
[135] INA § 101(a)(15)(U)(i)(IV). "Indian country" is defined at 8 CFR § 214.14(a)(4). "Military Installation" is defined at 8 CFR § 214.14(a)(6). "Territories or possessions of the United States" is defined at 8 CFR § 214.14(a)(11).
[136] *See* 8 C.F.R. § 214.14(b)(4).
[137] *Cf.* INA § 101(a)(15)(U)(i)(III).

crime and the conviction and sentencing of the perpetrator.[138] There is no requirement that the investigation or prosecution resulted in a conviction.

e. Law enforcement certification of the noncitizen's cooperation with an investigation or prosecution

A law enforcement official, prosecutor, judge, or other official (the "certifying official") must complete a form certifying that the noncitizen was helpful, is being helpful, or is likely to be helpful "in the investigation or prosecution of" the qualifying crime.[139] This "law enforcement certification" must be submitted on Form I-918, Supplement B ("Form I-918B"). A U petition will not be accepted without Form I-918B.[140]

Note: Young victims and victims who are "incapacitated or incompetent"

Victims who were under age 16 at the time of the qualifying crime can have "a parent, guardian, or next friend" possess information and cooperate with the investigation or prosecution on their behalf.[141] Crime victims who are "incapacitated or incompetent" may also benefit from this rule.[142]

f. Additional requirements

The noncitizen must also show that they: 1) possess information about the qualifying crime[143], and 2) suffered substantial physical or mental abuse as a result of their victimization.[144] There is no requirement that the noncitizen suffered physical injury to qualify for U nonimmigrant status. The factors USCIS considers in determining whether abuse was "substantial" are found at 8 CFR § 214.14(b)(1).

2. U derivative family members

A "principal" U nonimmigrant status petitioner (the "U-1")[145] can petition for certain family members ("derivatives"). The U-1 files I-918 Supplement A ("Form I-918A") for a derivative with USCIS. Which family members can be derivatives depends on the age of the U-1 at the time the U-1 filed their Form I-918.

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[138] *See* 8 CFR § 214.14(a)(5).
[139] *See* INA § 214(p)(1).
[140] *See id*. ("The petition filed by an [noncitizen] under section 1101(a)(15)(U)(i) of this title *shall* contain a certification…") (emphasis added).
[141] See 8 CFR § 214.14(b)(2)-(3).
[142] *See id*.
[143] *See* INA 101(a)(15)(U)(i)(II).
[144] *See* INA 101(a)(15)(U)(i)(I).
[145] *See* INA § 214.1(a)(2).

All U-1s can petition for the following family members:

- U-2: Spouse; and
- U-3: Unmarried children under 21.[146]

U-1s who were under 21 at the time they filed their I-918 can petition for the following family members:

- U-2: Spouse;
- U-3: Unmarried children under 21;
- U-4: Parent; and
- U-5: Unmarried siblings who were under 18 at the time the U-1's I-918 was filed.[147]

a. "Age-out" protection

"Age-out" protections in the INA allow some parents and siblings of child U-1s to remain eligible as derivatives even if the U-1 turns 21. They also allow some noncitizens to remain eligible as child derivatives even if they turn 21. The age-out protections are found at INA § 214(p)(7).[148]

3. Waivers of inadmissibility for U-1s and U derivatives

Applicants for U status are subject to all grounds of inadmissibility except for public charge.[149] Inadmissible U applicants must request and receive a waiver of inadmissibility in order for their I-918 or I-918A to be approved.[150] U applicants are eligible for waiver of many grounds of inadmissibility.

Two waivers are available to U nonimmigrant status petitioners:

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[146] *See* INA § 101(a)(15)(U)(ii)(I)-(II), *cf*. INA § 101(b)(1) (definition of "child"), 8 CFR § 214.1(a)(2) (codes for derivatives).
[147] *See* INA § 101(a)(15)(U)(ii)(I), *cf*. INA § 101(b)(1) (definition of "child"), 8 CFR § 214.1(a)(2) (codes for derivatives).
[148] For more information on age-out, please review ILRC and Immigration Center for Women and Children ("ICWC")'s Practice Advisory.
[149] *See* INA § 212(a)(4)(E)(ii).
[150] *Cf*. INA § 212(a) ("Except as otherwise provided in this chapter, [noncitizens] who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States"), 8 CFR §§ 214.14(c)(2)(iv) and 214.14(f)(3)(ii).

a. INA § 212(d)(14): U nonimmigrant waiver or "(d)(14)" waiver

U applicants are eligible to request a waiver of most grounds of inadmissibility under INA § 212(d)(14). This waiver is specific to U applicants. This waiver is available if USCIS, in its discretion, determines that granting the waiver is "in the public or national interest."[151] The (d)(14) waiver is available for all grounds of inadmissibility except INA § 212(a)(3)(E) (participation in Nazi persecution before and during World War II, genocide, torture, or extrajudicial killing).[152] Therefore, U principal petitioners and derivatives are eligible for a waiver of most ground(s) of inadmissibility under INA § 212(d)(14).

b. INA §212(d)(3) ("general" nonimmigrant waiver or "(d)(3) waiver")

This waiver is primarily useful in removal proceedings in the Fourth, Seventh, and Eleventh circuits.[153] In these circuits, an Immigration Judge ("IJ") can grant a (d)(3) waiver of inadmissibility for a noncitizen who is in removal proceedings and has applied for U nonimmigrant status with USCIS. The (d)(3) waiver is available for most grounds of inadmissibility except for some "security and related grounds."[154] The (d)(3) waiver may be granted based on purely discretionary considerations.[155]

4. Approval of U nonimmigrant status

U nonimmigrant status is valid for up to four years.[156] Approved U-1s and U derivatives are eligible for employment authorization.[157]

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[151] *See* § INA 212(d)(14).
[152] *See* INA § 212(d)(14) (cross-referencing inadmissibility under INA § 212(a)(3)(E) as an exception to the universal waiver).
[153] *See Jimenez-Rodriguez v. Garland*, 996 F.3d 190 (4th Cir. 2021), *Baez-Sanchez v. Barr*, 947 F.3d 1033 (7th Cir. 2020), *Baez-Sanchez v. Sessions*, 862 F.3d 638 (7th Cir. 2017), *Meridor v. U.S. Attorney Gen.*, 891 F.3d 1302 (11th Cir. 2018).
[154] *See* INA § 212(d)(3)(A).
[155] The factors to be considered in the adjudication of this waiver are found in *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978).
[156] *See* INA § 214(p)(6).
[157] *See* INA § 214(p)(3)(B) ("the Attorney General shall, during the period those [noncitizens] are in lawful temporary resident status under that subsection, provide the [noncitizens] with employment authorization.").

5. LPR status for U principals and derivatives

U principals and derivatives can apply for LPR status if they have been "physically present" in the U.S. for a continuous period of at least three years after being approved for U status.[158] The regulations generally require the noncitizen to be in valid U status when they apply for U-based AOS.[159] Generally, U-based AOS applicants do not need to show that they are admissible; however, inadmissibility under INA § 212(a)(3)(E) is a bar to U-based AOS.[160]

Practitioners should review INA § 245(m) and 8 CFR § 245.24 for more information on the eligibility requirements for U-based adjustment of status.

Some noncitizen survivors of human trafficking may be eligible for a form of nonimmigrant status that shares some similarities with U nonimmigrant status. This status for trafficking survivors is called T nonimmigrant status.

B. T Nonimmigrant Status

T nonimmigrant status is available to noncitizen victims of "a severe form of trafficking in persons."[161] Noncitizen trafficking survivors apply for T status by filing Form I-914 with USCIS.

1. T nonimmigrant status eligibility

T applicants must meet four main eligibility requirements:

a. "Severe form of trafficking in persons"

The applicant must show that they were a victim of a "severe form of trafficking in persons." This includes labor and sex trafficking, both through force, fraud or coercion.[162] If a noncitizen was under age 18 at the time of involvement in commercial sex, there is no requirement to show force, fraud, or coercion.[163] "Commercial sex" includes the exchange of a "sex

[158] *See* INA § 245(m)(1)(A).
[159] 8 CFR § 245.24(b)(2)(ii).
[160] *See* INA § 245(m)(1) ("The Secretary of Homeland Security may adjust the status of an [noncitizen] admitted into the United States (or otherwise provided nonimmigrant status) under section 1101(a)(15)(U) if this title to that of an [noncitizen] lawfully admitted for permanent residence if the [noncitizen] is not described in section 1182(a)(3)(E) of this title…").
[161] *See* INA § 101(a)(15)(T)(i)(I).
[162] *See* 22 U.S.C. § 7102(11).
[163] *See* 22 U.S.C. § 7102(11)(A).

act" for "anything of value."[164] The thing "of value" does not have to be money, nor does it have to be received by the survivor.[165]

b. Cooperation with law enforcement

Generally, trafficking survivors must be willing to cooperate with a law enforcement investigation or prosecution of the trafficking to be eligible for T nonimmigrant status.[166] However, there are two groups of noncitizen survivors who are not required to demonstrate cooperation:

i. Applicants under age 18.[167] USCIS's interpretation is that the applicant's age for this purpose is measured at the time of trafficking, not the time of filing.[168]

ii. Applicants who cannot cooperate "due to physical or psychological trauma."[169]

How can a survivor show cooperation with law enforcement?

Applicants for T nonimmigrant status are not required to provide a law enforcement certification as evidence of cooperation[170], although they may choose to do so. The law enforcement certification is submitted on Form I-914 Supplement B ("I-914B"). Trafficking survivors who do not submit Form I-914B should submit alternative evidence of cooperation unless they are asserting that they qualify for an exception.

USCIS has stated that a T applicant can show evidence of cooperation by reporting the trafficking "to law enforcement by email, letter, or other reporting mechanisms and complying with reasonable requests for assistance".[171] When determining whether a law enforcement request for assistance is "reasonable", USCIS considers the factors enumerated at 8 CFR §§ 214.11(a) and (h)(2).

c. Physical presence in the U.S. on account of trafficking

The T applicant must show that they "are physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana

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[164] *See* 22 U.S.C. § 7102(4).
[165] *See id*. (the thing "of value" may be "given to or received by *any person*.") (emphasis added).
[166] *See* INA § 101(a)(15)(T)(i)(III)(aa).
[167] *See* INA § 101(a)(15)(T)(i)(III)(cc).
[168] *See* 3 USCIS-PM B.2(A) ("Have complied with any reasonable request for assistance…except when the applicant was under 18 years of age at the time of victimization").
[169] *See* INA § 101(a)(15)(T)(i)(III)(bb).
[170] *See* INA §§ 101(a)(15)(T) and INA 214(o) (contains no law enforcement certification requirement).
[171] 3 USCIS-PM B.2(D)(4).

Islands, or at a port of entry thereto, on account of" human trafficking.[172] This includes being physically present in one of these places because the noncitizen was allowed into the U.S. "for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking".[173]

Examples of noncitizens who are physically present on account of trafficking are found at 8 CFR § 214.11(g)(1). A noncitizen does not need to show that their entry to the United States was connected to trafficking in order to meet the physical presence requirement.

- A noncitizen whose entry to the U.S. was unrelated to the trafficking, but who was trafficked in the U.S. and is currently cooperating with a U.S. law enforcement investigation of the trafficking and/or is receiving trafficking victim services in the U.S. may be able to show that they are physically present in the U.S. on account of trafficking.[174]

d. Extreme hardship involving unusual and severe harm upon removal

An applicant for T nonimmigrant status must show that they "would suffer extreme hardship involving unusual and severe harm upon removal" from the U.S.[175] This high standard requires more than "current or future economic detriment, or the lack of, or disruption to, social or economic opportunities."[176] Factors that USCIS considers when determining whether the trafficking survivor meets the statutory hardship standard are found at 8 CF.R. § 214.11(i)(2). Some of the severe hardship factors consider the unique hardships associated with human trafficking victimization.[177] Practitioners are encouraged to use the extreme hardship factors to guide their client interviews, submission of evidence, and arguments.

2. T derivative family members

A "principal" applicant for T nonimmigrant status (the "T-1")[178] can petition for T nonimmigrant status for certain family members ("derivatives"). The

[172] *See* INA § 101(a)(15)(T)(i)(II).
[173] *See id*.
[174] For more information on physical presence, please review the USCIS Policy Manual and resources from the Coalition to Abolish Slavery and Trafficking ("CAST").
[175] *See* INA § 101(a)(15)(T)(i)(IV).
[176] *See* 8 CFR § 214.11(i)(1).
[177] *See* 8 CFR § 214.11(i)(2).
[178] *See* INA § 214.1(a)(2).

T-1 files Form I-914 Supplement A ("Form I-914A") for a derivative family member with USCIS. Which family members can be derivatives depends in part on the age of the T-1 at the time the T-1 filed their Form I-914.

All T-1s can petition for the following family members:

- T-2: Spouse;
- T-3: Unmarried children under 21; [179] and
- T-6: Parents, unmarried siblings under 18, and any adult or minor child of a derivative who "faces a present danger of retaliation as a result of the" noncitizen survivor's "escape" from the trafficking "or cooperation with law enforcement."[180]

T-1s who were under 21 at the time they filed their I-914 can petition for the following family members:

- T-2: Spouse;
- T-3: Unmarried children under 21;
- T-4: Parent, regardless of whether the parent "faces a present danger of retaliation";
- T-5: Unmarried siblings who were under 18 at the time the T-1's I-914 was filed, regardless of whether the sibling "faces a present danger of retaliation"[181]; and
- T-6: See T-6 above.[182]

a. "Age-out" protection

"Age-out" protection allows some parents and siblings of child T-1s to remain eligible as derivatives even if the T-1 turns 21. It also allows some noncitizens to remain eligible as child derivatives even if they turn 21.

These are the age-out rules:

Child T-1s

A T-1 remains a "child" for T purposes if they turned 21 after their I-914 was filed but while it was pending.[183] It is unknown whether USCIS or the U.S. Department of State ("DOS") would continue to treat a T-1 as a "child" if the T-1 turned 21 after the approval of their I-914.

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[179] *See* INA §§ 101(a)(15)(T)(ii)(I)-(II), 101(b)(1) (definition of child)..
[180] *See* INA § 101(a)(15)(T)(ii)(III).
[181] *See* INA §§ 101(a)(15)(T)(ii)(I), 101(b)(1) (definition of child).
[182] *See* INA § 101(a)(15)(T)(ii)(III).
[183] *See* INA § 214(o)(5).

Example

Jimena filed her I-914 when she was 19. Jimena did not file I-914As for her parents or sister at this time. Jimena is now 21 and her I-914 remains pending.

Jimena called your office and asked if she can file I-914As for her parents and sister. Jimena's sister was 17 when Jimena filed her I-914. Jimena's sister is now 19 and remains unmarried. Can Jimena file I-914As for her parents and sister?

- Yes!
- Jimena is still considered a "child" for T purposes because she turned 21 while her I-914 was pending. Therefore, she can file I-914As for her parents as T-4 derivatives even though she is now 21 years old.
- Jimena's sister remains eligible as a T-5 derivative for three reasons: 1) Jimena's sister was under 18 when Jimena filed her I-914; 2) Jimena turned 21 while her I-914 was pending; and 3) Jimena's sister remains unmarried.

Child derivatives

A T-3 remains a "child" for T purposes if they turned 21 after the T-1's I-914 was filed but while the T-1's I-914 was pending.[184] It is unknown whether USCIS or DOS would continue to treat a T-3 as a "child" if the T-3 turned 21 after the approval of the T-1's I-914.

Example

Juan filed Form I-914 when his daughter Liset was 20. Juan did not file an I-914A for Liset at this time. Liset is now 22. She remains unmarried. Juan's I-914 is still pending. Juan called your office and asked if he can file I-914A for Liset now.

- Yes! Juan can file I-914A for Liset for two reasons: 1) Liset turned 21 while Juan's I-914 was pending; and 2) Liset is unmarried.

Caution: There is no "marry-out" protection for T-3s. Clients should be advised accordingly. To maintain eligibility as a T-3 derivative, a T-3 who is in the U.S. must remain unmarried until after their I-914A is approved. A T-3 who is abroad must wait to marry until after they enter the U.S. with their T visa. If the T-3 is abroad, marriage after I-914A approval but

[184] *See* INA § 214(o)(4).

before entry to the U.S. with their T-3 visa cuts off their eligibility. Ideally, all T-3s should wait to marry until after their T-based AOS is approved.

3. Inadmissibility waivers for T-1s and T derivatives

T nonimmigrant status applicants are subject to all grounds of inadmissibility except for public charge.[185] T applicants who are inadmissible must apply for and receive a waiver in order for their Form I-914 or Form I-914A to be approved.[186] Two waivers are available to T nonimmigrant status applicants.

a. INA § 212(d)(3) waiver

Applicants for T nonimmigrant status can apply for the (d)(3) waiver directly with USCIS.[187] The waiver is purely discretionary, and there is no requirement that the ground of inadmissibility is connected to the trafficking. A T nonimmigrant applicant who has non-security related ground(s) of inadmissibility[188] that are not connected to the trafficking can apply for a waiver of these ground(s) under (d)(3), with the factors outlined in *Matter of Hranka*[189] guiding USCIS's adjudication of the waiver. The *Hranka* factors are: 1) "the risk of harm to society if the applicant is admitted"; 2) "the seriousness of the applicant's prior immigration law, or criminal law, violations, if any"; and 3) "the nature of the applicant's reasons for wishing to enter the United States."[190]

b. INA § 212(d)(13) waiver

Congress created a waiver for T nonimmigrant applicants that is distinct from the (d)(3) waiver. This is the INA § 212(d)(13) waiver. An applicant for T nonimmigrant status with ground(s) of inadmissibility must meet three

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[185] *See* INA § 212(d)(13)(A) ("The Secretary of Homeland Security shall determine whether a ground for inadmissibility exists with respect to a nonimmigrant described in section 1101(a)(15)(T) of this title, except that the ground for inadmissibility described in subsection (a)(4) [public charge] shall not apply with respect to such a nonimmigrant.").
[186] *See* INA §212(a) ("Except as otherwise provided in this chapter, [noncitizens] who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States"), 8 CFR § 214.11(d)(2)(iii), 8 CFR 214.11(k)(3)(iv).
[187] *Cf*. INA § 212(d)(13)(B) ("In addition to any other waiver that may be available under this section…") (the (d)(3) waiver is available under § 212).
[188] *Cf*. INA § 212(d)(3)(A) (excludes some security-related grounds of inadmissibility from the waiver).
[189] 16 I&N Dec. 491 (BIA 1978).
[190] *See id*. at 492.

requirements in order to be eligible for the (d)(13) waiver:

1. The ground of inadmissibility can be waived under INA § 212(d)(13)[191];
2. The activities that rendered the noncitizen inadmissible "were caused by, or were incident to," the trafficking victimization; and
3. Granting the waiver is "in the national interest".[192]

4. What happens if T nonimmigrant status is granted?

Approved T applicants receive T nonimmigrant status for up to four years.[193] T-1 nonimmigrants are employment authorized incident to their status.[194] T derivatives must receive a work permit in order to work lawfully in the United States.[195]

5. LPR status for T principals and derivatives

A T nonimmigrant may apply for LPR status once they have been "physically present" in the U.S. for at least three continuous years after being admitted as a T nonimmigrant.[196] Alternatively, a T nonimmigrant can apply for LPR status earlier if they have "been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking" and "the investigation or prosecution is complete."[197] This provision does not require that an investigation or prosecution actually occurred. T applicants who are applying for "early adjustment" must submit a letter from the U.S. Attorney General that certifies the investigation or prosecution is complete.[198]

The regulations generally require the noncitizen to be in valid T

[191] Please review INA § 212(d)(13) for a list of inadmissibility grounds that can and cannot be waived under this provision.
[192] The statute does not define "national interest." However, the USCIS Policy Manual contains guidance on factors USCIS may consider when deciding whether the grant of a waiver is in the national interest. *See* 9 USCIS-PM O.3(B).
[193] *See* INA § 214(o)(7)(A).
[194] *See* 8 CFR §214.11(d)(11).
[195] *See* 8 CFR § 274a.12(c)(25).
[196] *See* INA § 245(l)(1)(A).
[197] *See id*.
[198] For more information on early adjustment, please review resources from the Coalition to Abolish Slavery and Trafficking ("CAST"), www.castla.org.

nonimmigrant status when they apply for T-based AOS.[199] T derivatives' ability to adjust is dependent on the T-1 adjusting.[200]

Inadmissibility is a bar to T-based AOS under INA § 245(l) for principals and derivatives when the noncitizen is inadmissible for a ground that has not previously been waived under INA § 212.[201] T principals and derivatives may receive a waiver of inadmissibility for adjustment purposes under INA § 245(l)(2). The waiver is filed with USCIS on Form I-601. Except for health-related and public charge grounds of inadmissibility[202], the T AOS applicant must show that the activities that caused the ground of inadmissibility "were caused by, or were incident to" trafficking to be eligible for the waiver.[203] This may be a difficult standard to meet, especially for T derivatives.[204]

- **Caution**: To improve a client's chances of maintaining T AOS eligibility, it is critical that all grounds of inadmissibility are disclosed and waived at the T nonimmigrant stage and that no additional grounds of inadmissibility are incurred during T nonimmigrant status.

Finally, applicants for AOS based on T-1 status must demonstrate good moral character during T nonimmigrant status or qualify for a waiver.[205] T derivatives are not required to show good moral character to qualify for T-based AOS.[206]

Practitioners are encouraged to review INA § 245(l) and 8 CFR § 245.23 for the remaining eligibility requirements for T-based AOS.

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[199] 8 CFR §§ 245.23(a)(2)(ii) (T-1s), 245.23(b)(2) (T derivatives).
[200] *See* INA § 245(l)(1) (statute is structured such that adjustment of a "spouse, parent, sibling, or child of" a T principal ("a nonimmigrant admitted into the United States under 1101(a)(15)(T)(i) of this title") depends on the T-1 principal's adjustment). This is in contrast to INA § 245(m), which simply allows anyone who was admitted to the U.S. as a U nonimmigrant to adjust status if they meet certain requirements. *See also* 8 CFR § 245.23(b)(1) ("A derivative family member of a T-1 nonimmigrant status holder may be granted adjustment of status to that of an [noncitizen] lawfully admitted for permanent residence, provided: (1) The T-1 principal nonimmigrant has applied for adjustment of status under this section and meets the eligibility requirements…").
[201] *See* INA § 245(l)(2) ("Paragraph (1) shall not apply to an [noncitizen] admitted under section 1101(a)(15)(T) of this title who is inadmissible to the United States by reason of a ground that has not been waived under section 1182 of this title…").
[202] *See* INA § 245(l)(2)(A).
[203] *See* INA § 245(l)(2)(B).
[204] Waivers that are available to all "immigrants", such as INA § 212(h) waivers, may be available to T AOS applicants. However, it may be difficult for T nonimmigrants to establish eligibility for these waivers. Practitioners should review INA § 212 to determine if a T AOS client is eligible for an alternative waiver.
[205] *See* INA §§ 245(l)(1)(B) and (l)(6).
[206] *See* 8 CFR § 245.23(b) (unlike for T-1 principal adjustment, good moral character is not listed as a requirement for T derivative adjustment).

Conclusion

Immigrant survivors may be eligible for one or more forms of immigration relief based on their victimization. The eligibility rules for these forms of relief are based on the INA, regulations, form instructions, U.S. circuit court of appeals decisions, BIA decisions, and the USCIS Policy Manual. Practitioners are encouraged to review all of these sources to determine whether a noncitizen is eligible for survivor-based immigration relief and to contact ASISTA for technical assistance.

Appendix: Basic immigration terms

Code of Federal Regulations (CFR): The CFR contains federal agencies' interpretations of the statutes they administer. The immigration regulations interpret the I**mmigration and Nationality Act ("INA")** and often contain specific instructions about evidence that must be filed with an immigration application or petition. Most immigration regulations are found at Titles 8 and 22 of the CFR. An online version of the CFR is available here.

Executive Office of Immigration Review (EOIR or "Immigration Court"): EOIR conducts removal and deportation proceedings. It includes Immigration Judges ("IJs") and the Board of Immigration Appeals ("BIA"), and is part of the United States Department of Justice ("DOJ"). It is not part of United States Citizenship and Immigration Services ("USCIS") or Immigration and Customs Enforcement ("ICE").

Immigration and Customs Enforcement (ICE): ICE is the federal agency within the U.S. Department of Homeland Security ("DHS") that is responsible for enforcing U.S. immigration laws, often through the arrest and detention of noncitizens for alleged immigration violations. However, not all noncitizens will interact with ICE, and not all noncitizens who interact

with ICE will be taken into custody. In addition to immigration enforcement agents, ICE also employs the lawyers who present the U.S. government's case in immigration removal proceedings.

Immigration and Nationality Act (INA)**:** The INA is the main immigration statute in the United States. It contains the rules for survivor-based immigration relief and is contained in Title 8 of the United States Code. An online version of the INA is available here.

Inadmissibility: Inadmissibility prevents noncitizens[207] from accessing some immigration benefits unless they qualify for and receive a waiver. Noncitizens both in and outside the United States may be subject to grounds of inadmissibility. Most noncitizens[208] who enter the United States at a "port of entry" (such as an airport or land border post) are assessed by an immigration officer to determine if any grounds of inadmissibility prevent their entry. Inadmissibility can also apply to a noncitizen who is in the United States and applying for an immigration benefit such as adjustment to Lawful Permanent Resident ("LPR") status. The grounds of inadmissibility are found at INA § 212.

Lawful Permanent Resident (LPR): An LPR, sometimes called a "green card holder," is allowed to live and work indefinitely in the U.S., travel to and from the U.S., and receive additional public benefits. [209] An LPR's right to travel abroad is not unlimited; LPRs who remain outside the U.S. for too long may be considered to have "abandoned" their LPR status.[210] An LPR can also petition for a spouse or unmarried child to become an LPR, or to immigrate to the U.S. on an immigrant visa (a procedure known as "consular processing").[211]

Despite the term Lawful Permanent Resident, there are limits to an LPR's ability to remain in the U.S. An LPR can lose their status and be removed from the U.S. if they come within a "ground of deportability."[212] In some cases, the LPR can apply for a waiver to have the ground of deportability

[207] The INA often uses the term "alien." ASISTA uses "noncitizen" instead of "alien."
[208] For more information on when returning LPRs are subject to inadmissibility review, please review pages 4-7 of this resource from ILRC, https://www.ilrc.org/sites/default/files/sample-pdf/ch._1.pdf.
[209] *Cf.* 7 USCIS-PM A.1(A)
[210] *Cf. Matter of Kane*, 15 I&N Dec. 258 (BIA 1975).
[211] *See* INA § 204(a)(1)(B)(i)(I) (cross-referencing INA § 203(a)(2) (spouse and unmarried children and sons and daughters of LPRs).
[212] *See* INA § 237 for grounds of deportability. Grounds of deportability are distinct from grounds of inadmissibility, and apply to noncitizens who have already been admitted to the U.S.

forgiven.[213]

Removal and removal proceeding[214]: "Removal," colloquially known as "deportation," means the forced departure of a noncitizen from the U.S. A "removal proceeding" denotes a process of determining whether a noncitizen has a legal right to remain in the U.S. This determination may happen at or near a U.S. border in what is known as an "expedited removal" proceeding conducted by an officer of the Department of Homeland Security ("DHS"), or in a lengthier and more complex proceeding in Immigration Court before an IJ. Persons removed from the U.S. who re-enter the U.S. without permission are subject to "reinstatement of removal," a summary process that is similar to expedited removal.

In removal proceedings before an Immigration Court, a noncitizen may request "relief from removal" to allow them to remain in the U.S. Relief from removal often takes the form of humanitarian relief, a waiver of immigration law violations, or family-based immigration. Noncitizens may request more than one form of relief from removal in removal proceedings before an IJ.

Persons may be ordered removed without being physically deported. There are more than one million noncitizens in the U.S. with outstanding removal orders, or "final orders of removal."[215]

United States Citizenship and Immigration Services ("USCIS"): USCIS is the federal agency within DHS that is responsible for the adjudication of affirmative requests for immigration benefits. "Affirmative" requests are requests that are not presented to an Immigration Judge. Some of the requests that USCIS adjudicates include Violence Against Women Act ("VAWA") Self-Petitions, applications for T nonimmigrant status, and petitions for U nonimmigrant status.

[213] *See*, *e.g.*, INA § 237(a)(7) (waiver of certain "domestic violence" deportability grounds for survivors of domestic violence who meet certain conditions.)
[214] For more information on removal proceedings, please review this 2022 overview from the American Immigration Council ("AIC"), *The Removal System of the United States: An Overview*, Aug. 9, 2022, https://www.americanimmigrationcouncil.org/research/removal-system-united-states-overview.
[215] *See Id.* at 2.

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