



PRACTICE ADVISORY:

Addressing Late-Breaking Inadmissibility Grounds for U Visa Beneficiaries¹

August 8, 2024

At some point, most practitioners who represent immigrant survivors seeking U nonimmigrant status will learn of an inadmissibility ground that has not yet been formally addressed by USCIS while a client’s petition is pending or after its approval. This type of “late-breaking” inadmissibility ground may come to light (1) after a U application is submitted but before it is decided, (2) after a U application has been granted, but before adjustment of status, or (3) after U-based adjustment of status has been granted. What to do in these situations depends on many factors, including the procedural posture, the nature of the ground itself, and the risks of removal in the client’s case, given their positive and negative equities and the political landscape at the time. This practice advisory summarizes the strategies practitioners can employ when they learn of a “late-breaking” inadmissibility ground.² It examines them in chronological order of procedural posture, with additional notes about particular concerns, practice tips, and examples:³

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² As indicated throughout this advisory, USCIS has not published official positions on many of the strategies described here. ASISTA bases its descriptions of processes and arguments on over 15 years of delivering technical assistance to attorneys representing immigrant survivors, and adjudication patterns and anecdotes detected therefrom. The advisory is current as of the date above. Practitioners should always research the latest official DHS policies before proceeding.

³ This advisory does not discuss how to determine if something is an inadmissibility ground. For information on that, review ASISTA’s [Inadmissibility Issues](#) page, see [ASISTA, Practice Advisory: Representing Criminalized Survivors: Impact of Criminal Inadmissibility on Survivor-Based Immigration Remedies \(Jan. 18, 2023\)](#), and view relevant webinars.

A. Inadmissibility Triggered and Discovered Before U Application Decided:

When an inadmissibility ground comes to light after submitting the U petition but prior to decision, the next step is straightforward. The applicant must disclose the inadmissibility and seek a discretionary waiver. If the attorney knows the ground was triggered but the client does not agree to disclosure, the attorney should consult their state ethics rules to determine whether they can continue to represent the client.

Disclosing a ground and seeking its waiver in this context is similar to disclosing a ground and applying for a waiver from the outset. If a Form I-192 has not yet been filed, it should be now, along with all required and discretionary evidence.⁴ If a Form I-192 is already pending, you may request to amend it, via mail and the applicable attorney email hotline.⁵ The amendment request should include a cover letter, with the client's full name, A-number, and receipt numbers for Forms I-918 and I-192, as well as red-lined versions of the form pages that need amending, a supplemental personal statement from the client, and additional discretionary documentation as available.

After you learn of the undisclosed inadmissibility, review your client's initial filing to identify any incorrect information that might be deemed a material misrepresentation (an additional inadmissibility ground to be waived).⁶ Even where no misrepresentation occurred, USCIS will likely consider the late disclosure a negative discretionary factor. Your client will have to counterbalance it with positive evidence. You can help them do this and explain their initial nondisclosure sympathetically in a supplemental statement.

Practice Tip:

Check That the New Disclosure Actually Triggers an Inadmissibility Ground

Before following the steps in this resource, analyze thoroughly whether the client's conduct actually meets every element of a separate inadmissibility ground, according to the statute, case law, and USCIS Policy Manual interpretation. If there is a good-faith argument that not all elements are met, decide whether to disclose or not by considering state ethics rules, overall case strategy and risks, and the client's wishes.

⁴ Note that 8 CFR § 213.14(c)(2)(iv) describes Form I-192 as "initial evidence" for inadmissible applicants. It says Form I-192 should be submitted with Form I-918. *Id.* However, in practice, USCIS routinely accepts Form I-192s much later, and frequently (though not always) issues RFEs for missing Form I-192s, instead of denials. Counting on this, some practitioners omit the Form I-192 when filing the I-918 for strategic and capacity reasons, and instead just disclose the inadmissibility in the I-918 cover letter and client statement. This is still a "timely-disclosed" inadmissibility for purposes of this resource.

⁵ Always submit the amendment by mail, with tracking. ASISTA also recommends sending a scan of that submission to the relevant Service Center [hotline](#) because it provides additional documentation of the disclosure and waiver request, in case USCIS fails to connect the amendment with the A-file.

⁶ INA § 212(a)(6)(C)). Not every incorrect marking is a material misrepresentation inadmissibility ground. Compare the [USCIS Policy Manual](#)'s explanation with the client's inaccurate answer and reason for it.

If you are certain your client triggered an inadmissibility ground, but they do not agree to let you disclose it, your ethical duty of candor to the tribunal could be implicated. You may wish to consult your state ethics hotline about your options and responsibilities; it is possible you must withdraw from representation or take other ameliorative steps to correct a misleading record.⁷

Example: You helped Client apply for a U visa in 2020. In 2024, Client discloses they misrepresented their date of entry on a 2001 TPS application, to obtain approval. You should ask Client why they did not disclose this to you previously, and consider if there are any sympathetic explanations. You should also review the full U visa application packet to see if the misrepresentation was perpetuated there, including if a box was checked denying any misrepresentations to gain an immigration benefit.

Once you identify all inadmissibilities stemming from this disclosure, you should advise Client that to avoid problems with the U petition or eligibility for adjustment or naturalization in the future, they must disclose the falsehood and seek a waiver of the triggered inadmissibility grounds. If Client agrees, help them prepare an affidavit explaining the initial TPS misrepresentation and any mitigating factors, indications of Client taking responsibility, feeling remorse, and demonstrating rehabilitation. If Client resists because they do not want to lose TPS, consult your state ethics hotline, because you may have to take remedial measures or withdraw.

B. Inadmissibility Ground Triggered Before Grant of U Application, But Not Discovered until Afterwards:

If you learn of an inadmissibility ground only after the U application is granted, a key question to ask is, *When was the ground triggered?* If it was before the U decision, the ground should have been waived for the decision to be substantively lawful.⁸

⁷ See ABA Model Rule of Professional Conduct 3.3(a)(1) & (2). See also 8 CFR § 1003.102(c).

⁸ An admission that was not substantively lawful can cause many problems. Most immediately, a U visa can be revoked if it was granted “in error.” 8 CFR § 214.14(h)(2)(B). Further, if the client travels internationally and seeks a U visa abroad for return, the consulate may refuse the visa until a waiver of that inadmissibility ground is granted. USCIS may consider the late disclosure to be a negative factor, which could lead to waiver denial. Or, even if the waiver is ultimately granted, the process may take so long that the client spends more than 90 days abroad, thus breaking the continuous physical presence needed for adjustment of status under INA § 245(m). Finally, as discussed later in this resource, USCIS sometimes treats an improvidently granted U visa as failing to satisfy the U-based adjustment of status requirement that the applicant have been “lawfully admitted to the United States as either a U-1, U-2, U-3, U-4, or U-5 nonimmigrant.” 8 CFR § 245.24(b)(2)(i). See also, e.g., *Matter of Koloamatangi*, 23 I&N Dec. 548, 550 (BIA 2003) (setting forth the general rule that, where a benefit requires having been “lawfully” admitted, this “denotes compliance with substantive legal requirements, not mere procedural regularity.”).

Practice Tip: Screen and Re-Screen

When you take over a case, never assume prior counsel correctly identified and waived all applicable inadmissibility grounds, even if the U was granted with a waiver. Instead, always conduct an in-depth screening and do FOIAs and basic criminal background checks. This will help you identify any late-breaking inadmissibility grounds early on, leaving you as many strategies to address them as possible.

To address such a late-breaking ground of inadmissibility that existed at the time a U visa application was granted, practitioners should consider three things: **(1) was the ground actually unwaived?, (2) were facts suggesting inadmissibility disclosed in the application?, and (3) if a waiver was needed but not granted, how does your client wish to proceed?** We take these in order below, and describe what to do, depending on their answers.

1. Was the ground actually unwaived?

USCIS has a statutory and regulatory duty to review all evidence submitted with a U visa application and determine if the person is eligible or a ground of inadmissibility exists.⁹ In so doing, USCIS generally identifies all grounds of inadmissibility apparent from information entered in the application form, accompanying evidence, and background checks, even if the applicant fails to identify or seek a waiver for them. If it finds a ground the applicant did not request to waive, USCIS typically issues an RFE or NOID, inviting the applicant to explain why they are not inadmissible for that ground, or to submit a Form I-192 if they are.¹⁰ However, where an I-192 was already pending for other grounds, it is also within USCIS's discretion to simply fold the unrequested ground in with the rest of the waiver request and determine if granting the waiver for everything would be in the public or national interest.¹¹

Because of this, where counsel and applicant believe there is a "late-breaking" ground, it is actually possible USCIS detected the ground and waived it without the applicant knowing. Depending on when the I-192 was granted, the approval notice may

⁹ INA § 212(d)(14); 8 CFR 214.14(c)(4) & (5).

¹⁰ Unfortunately, it is discretionary whether to issue an RFE or NOID, and USCIS also has the authority to deny the application outright. 8 CFR § 103.2(b)(8)(ii) (making RFEs for initial evidence discretionary); 8 CFR § 214.14(c)(2)(iv) (describing Form I-192 as initial evidence for inadmissible U applicants, thus implicating § 103.2(b)(8)(ii)). However, as of the date of this advisory, it appears rare for USCIS to forego an RFE or NOID in this scenario. Notably, if Form I-192 was already pending, just missing a ground, an applicant can file an amendment to that Form rather than a whole new I-192. See Part A of this Advisory.

¹¹ 8 CFR 212.17(b)(1) ("USCIS, in its discretion, may grant the waiver based on 212(d)(14) of the Act, 8 USC 1182(d)(14), if it determines that it is in the public or national interest to exercise discretion to waive *the applicable ground(s) of inadmissibility* [emphasis added].")

or may not state which grounds were waived.¹² If it does not, there are likely records in the A-file indicating what USCIS waived, and you will want to review them. Even if the approval notice states the grounds waived and does not list the “late-breaking” ground, there is a small possibility it is inaccurate. The chance of either of these happening is elevated if your client’s U application disclosed facts constituting an inadmissibility ground, even if the ground was not included in the Form I-192 waiver request. (See Section B2 below.) To confirm which grounds were officially waived, ASISTA recommends submitting a Freedom of Information Act (FOIA) request to USCIS for the adjudicating officer’s notes and the “I-192 approval sheet and U-1 checklist.”¹³ In the best case scenario, the FOIA results may reveal the issue to already be resolved and save significant anguish and effort of trying to waive the ground at this later juncture.

2. Were facts establishing inadmissibility disclosed in the application?

As noted, when rendering its decision, USCIS has a duty to review *de novo* all evidence submitted with a U visa application and determine if the person is admissible.¹⁴ Accordingly, if an applicant discloses facts that add up to an inadmissibility ground, USCIS generally must identify the inadmissibility, even where an applicant does not ask for it to be waived.¹⁵ If USCIS considers and approves a Form I-192 on such a record, this arguably signals all grounds supported by the evidence were waived.¹⁶

If you represent an applicant in these circumstances, you can consider writing to the service center that decided the case and requesting an updated approval notice that lists the ground. You can do this by mail or the applicable attorney email hotline. Be sure to include evidence showing where in the original application the ground had been disclosed. If you asked for USCIS to waive all inadmissibility grounds it deemed to apply, you can point that out as well. Some applicants have successfully received new notices this way. If your client does not, discuss with them what this could mean and how to proceed.¹⁷

¹² Prior to 2020, USCIS did not regularly list the waived grounds on the Form I-192 approval notice.

¹³ See USCIS, “Request Records through the Freedom of Information Act or Privacy Act,” <https://www.uscis.gov/records/request-records-through-the-freedom-of-information-act-or-privacy-act>.

¹⁴ INA § 212(d)(14); 8 CFR § 214.14(c)(4) & (5).

¹⁵ *Id.* It used to be common to submit a Form I-192 with a catch-all request to waive “any and all grounds USCIS deems to apply.” USCIS states it no longer accepts such a general request, and ASISTA does not recommend it, at least not without also listing the known grounds. *Accord* Form I-192 Instructions (directing applicants to “specif[y] the applicable ground of inadmissibility” they want waived). Despite this change in USCIS practice, some practitioners have successfully requested an updated approval notice by showing where facts underlying the inadmissibility ground were disclosed in the filing.

¹⁶ 8 CFR § 214.14(c)(4); *e.g.*, *United States v. Chem. Found., Inc.*, 272 U.S. 1, 15 (1926) (describing the presumption that government officials “have properly discharged their official duties”).

¹⁷ There are many reasons USCIS may not issue the amended notice. Ideally, it will tell you why, and you can follow tips elsewhere in this Advisory to proceed. If it does not, the refusal may signal USCIS did not agree that the ground had been triggered. Alternatively, as with any hotline email, a lack of response

3. If a waiver was needed but not granted, how does your client wish to proceed?

If you confirm the late-breaking inadmissibility ground was not waived and not previously disclosed, there are **two options** for how to proceed. The choice between them should be made by you and your client together, once you understand all the facts and they understand all the risks of each option. First, however, you will need to elicit additional information from your client about their reasons for not disclosing the inadmissibility ground at the time of filing the U visa application.

The first thing you need to know is *why* the client did not disclose this ground earlier. Some reasons are more sympathetic than others, such as having received poor advice or interpretation with prior counsel, or having been in a state of acute distress, trauma, or mental illness at the time of preparing the prior application, such that their memory, understanding, or judgment was clouded. Other times, these equities may not be present. To understand your best strategy and the prospects for success, you must examine deeply what led to the client's failure to disclose the ground, and assess whether the explanation would appear reasonable or sympathetic to an adjudicator.

In addition, you should consider how well the inadmissibility ground itself may reasonably be understood by (1) a lay person in general, and (2) your client in particular. Specifically, determine if any part of it requires a legal analysis or conclusion to know that the ground was triggered. For instance, consider the commonly undisclosed inadmissibility ground for smuggling under INA § 212(a)(6)(E). The average person who has not studied immigration law may reasonably construe the Form I-918 question about “knowingly encourag[ing], induc[ing], assist[ing], abet[ing], or aid[ing] a [noncitizen] to try to enter the United States illegally”¹⁸ as equating to the crime of human smuggling or trafficking, or at least to being present while the other person enters unlawfully. Yet the government has construed the ground to reach conduct far outside this colloquial understanding.¹⁹ For example, a client may trigger the smuggling ground by lending money to a cousin to pay for a hotel at the border, such that failure to respond affirmatively to that question on Form I-918 may be considered reasonable, understandable, and sympathetic.²⁰ The error may also be due to poor legal advice, which can be framed as a mitigating discretionary factor, as discussed further below.

could mean your email was overlooked. You can send a follow-up email after about 45 days and use the words “Follow-up request” or “Second request” in the subject line. It is reasonable to disfavor assuming a disclosed ground was waived unless and until USCIS confirms that it was.

¹⁸ Form I-918, Part 3, Question 4.c., Edition 04/01/2024.

¹⁹ See, e.g., 9 FAM 302.9-7; *Urzua Covarrubias v. Gonzales*, 487 F.3d 742, 748 (9th Cir. 2007).

²⁰ Indeed, this example would not always meet the definition of smuggling. See, e.g., 9 FAM 302.9-7; *Urzua Covarrubias v. Gonzales*, 487 F.3d 742.

Practice Tip:

Beware of USCIS Construing Non-Disclosure as a New Inadmissibility

Regardless of the stage at which it comes to light, addressing any late-breaking inadmissibility ground carries the **risk that USCIS will treat the failure to disclose it earlier as a material misrepresentation**. A material misrepresentation is a separate inadmissibility ground under INA § 212(a)(6)(C). The precise contours of the ground are outside the scope of this resource, but it generally requires a willfully-made inaccurate statement of a material fact, for the purpose of procuring an immigration benefit. It generally does not include silence or failure to volunteer information, unless the evidence shows the person was “reasonably aware of the nature of the information sought and knowingly, intentionally, and deliberately concealed information.” 8 USCIS-PM J.3.D.2. If your client’s answer to a form question was or may appear knowingly false, USCIS may construe this as a misrepresentation, and you should add INA § 212(a)(6)(C) to any waiver or waiver amendment you request, although you may do so “in an alternative” to arguing no misrepresentation occurred.

With these factors in mind, you will have two strategic options to discuss with the client, as described below.

a. Option A: Disclose additional ground of inadmissibility for the first time when applying for adjustment of status.

In the past, a common strategy for addressing an undisclosed ground of inadmissibility was to do nothing with regards to the improvidently-granted U and instead **disclose and address the issue for the first and only time when applying for adjustment of status** under INA § 245(m). Adjustment under § 245(m) does not require a showing of admissibility, so following this option would not involve any waiver filings. You would simply disclose the ground with the Form I-485 application, and ask for the application to be approved in the exercise of discretion, on the basis that adjustment remains conducive to the public interest, humanitarian interests, or family unity.²¹ In your cover letter and a client declaration, you should describe and document all mitigating factors surrounding the reason for nondisclosure, as well as all positive factors highlighted in the USCIS Policy Manual at Vol. 1, Part E, Chapter 8, on the Discretionary Analysis.²²

²¹ See INA § 245(m); 8 CFR § 245.24(d)(11) (“Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities. . . .”).

²² For more on strengthening an adjustment application, see Part C of this advisory. See also Kyle Dandeleit et al., *Advanced Issues in U Visa and U Adjustment of Status*, 285-89 (2021), available at

This strategy was historically used with success, but is no longer considered by ASISTA to be a best practice for three reasons. First, recent decisions by USCIS and the AAO frequently deny adjustment in this posture on the ground that U-based adjustment requires a lawful admission into U status, and no such lawful admission has occurred where an inadmissibility ground that applied at the time of I-918 adjudication was not waived by USCIS prior to granting the U visa.²³ Second, this strategy requires waiting for the applicant to accrue three years in U status, during which USCIS could discover the undisclosed ground and initiate the process of revoking the U status for having been procured by fraud or error.²⁴ Third, even if adjustment is successful, there is the risk that, if the client attempts to naturalize, that adjudicator may review the file and deem the adjustment to have been improper, leading them to deny the petition for naturalization. Depending on the circumstances and policy in place at that time, USCIS may even initiate proceedings to rescind the client's permanent residence or issue an NTA under INA § 237(a)(1)(A).²⁵ This is discussed further in [Part E](#) of this Advisory.

b. Option B: Seek a *nunc pro tunc* waiver of the previously undisclosed ground of inadmissibility.

Instead of waiting for adjustment to disclose the unwaived inadmissibility ground, ASISTA recommends seeking to retroactively waive the ground so that the U admission

<https://asistahelp.org/wp-content/uploads/2022/03/Advanced-Issues-in-U-Visas-and-U-AOS.pdf> (hereinafter “Advanced Issues Advisory”).

²³ See, e.g., [Matter of 15775655 \(AAO May 12, 2021\)](#) (unpublished) (denying U adjustment on the basis that 8 CFR § 245.24(b)(2)(i) requires a procedurally regular *and* substantively legal admission into U status, and that there can have been no substantively legal admission under 8 CFR § 214.1(a)(3)(i) unless the applicant was admissible or “any ground of inadmissibility ha[d] been waived....”).

²⁴ See 8 CFR § 214.14(h)(2)(B) & (C). Thankfully, revocation appears to be rare, but it is always wise to reduce your client's risk of it where possible.

²⁵ See 8 CFR § 246.1 et seq.; 7 USCIS PM Q.3 (laying out requirements and process for rescission of adjustment of status). As of the date of publication, there is no active NTA policy on USCIS's website, and USCIS states it is developing an entry for its Policy Manual that will accord with the enforcement priorities laid out in the 2021 DHS Memorandum, “Guidelines for the Enforcement of Civil Immigration Law.” See ASISTA, *ASISTA Virtual CLE Conference, Proceeding in Proceedings: Legal and Practical Strategies for Survivor-Based Removal Defense, DHS Panel: Updates in DHS Policy and Practice*, 2-3 (Dec. 13-14, 2023), available at <https://asistahelp.org/wp-content/uploads/2023/12/Session-3-Draft-ASISTA-Notes-from-USCIS-QA-December-Conference.pdf> (referencing Memorandum from Alejandro N. Mayorkas, Secretary of Homeland Security, to Tae D. Johnson, Acting Director of U.S. Immigration and Customs Enforcement (Sept. 30, 2021), available at <https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf>) (hereinafter “ASISTA 2023 DHS Panel”). Representatives should always ensure they know the most up-to-date USCIS policies on issuing NTAs by consulting government resources. Further, although the frequency with which particular USCIS field offices issue NTAs or vigorously review the propriety of prior decisions when considering naturalization applications appears to vary across the country, practitioners should never assume they will receive a merely cursory inspection and should counsel clients on worst case scenarios.

can be deemed substantively lawful. This strategy involves creating the legal fiction of having waived the ground before the U approval, known as **a waiver *nunc pro tunc***.

Nunc pro tunc inadmissibility waivers have long been recognized by the BIA under other INA subsections, and have been used with success by U recipients in seeking inadmissibility waivers in various unpublished cases.²⁶ Still, the decision by USCIS to grant *nunc pro tunc* relief is entirely discretionary and often described as being reserved for the most “exceptional cases.”²⁷ It is comparable to other forms of equitable relief, and **factors showing your client’s due diligence and the existence of extraordinary circumstances that stood in their way** will be imperative.

Unfortunately, where the record does not contain sympathetic reasons for failing to disclose or waive the issue previously, USCIS may deny the request. USCIS often takes the position that *nunc pro tunc* relief exists primarily to correct “administrative or judicial error by the government as a means to prevent inequity or injustice,” and not “for a petitioner, or any related private entity, to correct its [sic] own errors or retroactively change disqualifying circumstances of their own making.”²⁸ This adjudication pattern should not necessarily discourage you from seeking a *nunc pro tunc* waiver if one is needed to secure a client’s status, but it should underscore the need to carefully assess all factors about the nondisclosure, heavily document all positive discretionary factors in the case, and discuss the risks and benefits of pursuing this strategy with your client.

i. How can I make a *Nunc Pro Tunc* waiver request?

There are two methods to request a waiver of a late-breaking ground *nunc pro tunc*: (1) submit a full Form I-192 according to the form’s filing instructions, or, (2) if a Form I-192 was already approved, submit a request to amend the Form *nunc pro tunc*.²⁹

²⁶ *E.g.*, *Matter of P*, 8 I&N Dec 302 (1959) (regarding *nunc pro tunc* inadmissibility waiver under INA § 212(d)(3) for failure to disclose existing inadmissibility ground); *Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980) (regarding *nunc pro tunc* inadmissibility waiver under INA § 212(h)); *Matter of Garcia*, 21 I&N Dec. 254 (BIA 1996). It is notable, too, that, by statute, a waiver under INA § 212(d)(14) is available “with respect to a nonimmigrant described in [the U-visa provision of INA § 101]” and is not limited to persons seeking U status at the time of the waiver.

²⁷ See, e.g., [Matter of 15959435, 3 \(AAO, May 14, 2021\) \(unpublished\)](#).

²⁸ *Matter of 15959435*, *supra*, at 4.

²⁹ ASISTA currently recommends updating a survivor-based form by submitting only the page(s) you are seeking to alter or update, with red ink indicating the changes and a cover letter clearly explaining them. Use either the version of the form previously submitted or the current version, as you choose, and be sure to include the receipt and, if relevant, approval notice, for the form being amended. See ASISTA 2023 DHS Panel, *supra* at n. 25. If you have documentation supporting your change, include that as well, along with a G-28, and do not worry if you are not able to obtain a new signature from your client, as that is not generally required. Submit these materials by mail to the location that processed or is processing the form, and send a scan of the submission to the relevant hotline. *Id*; see also ASISTA, *Hot Tips for Using*

The amendment option was favored more frequently before the 2024 fee rule that exempted filing fees for U-related I-192s, and may still be preferable if your client cannot easily sign a new Form I-192 or pay for your services to complete a whole new waiver packet. However, a full second I-192 submission may give peace of mind because it will be formally receipted, whereas you will have no way of confirming receipt or tracking progress of an amendment request. For either submission type, clearly indicate with bold font and highlighting that the request is being made *nunc pro tunc*, and include a cover letter explaining the basis for *nunc pro tunc* relief in general and the reasons it should be granted in your case.³⁰ Make use of any arguments and sympathetic factors mentioned above that you can. Understand that, especially with amendments, it is common not to receive an I-797 notice of action deciding the *nunc pro tunc* waiver unless it is denied. For this reason, consider emailing the relevant hotline to inquire about the status of the request every 4-6 months. You may also submit a FOIA request to seek evidence the waiver was approved, or email the hotline to request an updated I-797 listing all waived grounds.

When making the request for a *nunc pro tunc* waiver, remember that attorney statements are not evidence. Be sure to include a client affidavit as well as additional documentary evidence supporting the waiver standard, *nunc pro tunc* nature, and positive discretion. If your client has a sympathetic reason for the late disclosure, be especially attentive to documenting it with as much credible evidence as possible. While USCIS policy, training, and AAO case law call for taking into account the effects of crime and trauma in general, you must affirmatively establish *both* the existence of the relevant circumstances, with objective, credible evidence, *and* the circumstances' effects on this part of the case in particular.³¹ If there was a misunderstanding of a legal requirement or definition that was due to ineffective assistance of counsel, ASISTA recommends complying with *Lozada* requirements, even if not strictly required.³²

Service Center Hotlines and Supplementing Pending Petitions 3- 4 (Jan 22, 2024), available at <https://asistahelp.org/wp-content/uploads/2024/01/Hot-Tips-for-Hotline-2024-Update-Jan-22.pdf>.

³⁰ For sample requests to amend an I-192 *nunc pro tunc*, see Advanced Issues Advisory, *supra* at n. 22.

³¹ See, e.g., [Matter of D-C-E-, ID# 16567 \(AAO June 9, 2016\)](#) (unpublished) (acknowledging applicant's description of symptoms that were consistent with PTSD, but finding the burden of proof not satisfied because of lack of medical records to confirm that conclusion); [Matter of _____ \(AAO Nov. 21, 2013\)](#) (unpublished) (recognizing applicant suffered panic attacks, paranoia, high blood pressure, depression, and anxiety, but finding failure on the substantial harm element because no medical professional connected these symptoms with the crime underlying the U visa application).

³² *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988). See, e.g., [Matter of I-Y-H- \(AAO Mar. 30, 2017\)](#) (unpublished) (scrutinizing whether *Lozada* elements were met when U recipient in revocation proceeding asserted ineffective assistance of counsel caused nondisclosure of inadmissibility). Note, however, that claims requesting sympathy and understanding for actions of counsel outside the client's control can also be persuasive for at least some purposes without *Lozada* compliance, and the degree of compliance with *Lozada* can vary by jurisdiction. E.g., *Hernandez-Mendoza v. Gonzales*, 537 F.3d 976, 978 (9th Cir. 2007) ("The *Lozada* requirements need not be applied where the ineffective assistance of counsel is "clear and obvious" from the record"). Note, too, that not all misunderstandings are due to ineffective

Practice Tip:

Remind Adjudicators of their Duty to Employ a Trauma-Informed Approach

USCIS training, policy, and case law instruct adjudicators to be conscious of how continuing (or additional) abuse, uprooting one’s life for safety, and physical and mental trauma can affect a person’s judgment, memory, and avoidance behavior.³³ Yet how these things can lead to late disclosures of negative factors may not be front of mind nor well understood by adjudicators, who may be more accustomed to considering them in contexts like the substantial harm analysis.

If negative life circumstances played a role in your client’s failure to timely disclose an inadmissibility ground, use evidence and research to bring that training and policy to the fore. For instance, if your client was still residing with an abuser or had entered a new abusive relationship at the time of the nondisclosure, provide evidence that this was happening, such as affidavits or proof of shared address. Separately, have your client explain what impact they felt this circumstance had on them at the time, such as being frequently distracted, unable to meet for long periods with an attorney, or depressed or anxious in a way that made them forget things, avoid topics that made them feel bad, or incapable of trusting the representative helping them prepare the application. Where possible, find and submit research articles corroborating the connection between their trauma and their experiences. Do the same for clients who explain they struggled with poverty, homelessness, or a complete loss of social networks after the crime or during the U application period; and do the same where a person had lasting diagnosable effects from traumatic events in their life, which were in force and impactful at the time disclosure was initially implicated.

The timing of a *nunc pro tunc* waiver request also deserves careful consideration. USCIS often takes the position that the person must still hold U status or be seeking it

assistance. In addition, if you were the attorney in the prior proceeding, as well, consider whether declaring yourself ineffective will actually help the client. Factors like the ease and speed with which your client could find new counsel, and whether starting over with a new attorney would be disproportionately retraumatizing should be considered with your client, alongside an assessment of how great and prejudicial your ineffectiveness actually was, especially in the context of this client’s discretionary equities.

³³ See, e.g., ASISTA, Notes on [Humanitarian, Adjustment, Removing Conditions and Travel Documents \(HART\) Service Center Quarterly Engagement](#) (Sep. 22, 2023) (reporting that USCIS HART Service Center officers receive training on “dynamics of domestic violence and trauma-informed, survivor-centered practices”); 72 Fed. Reg. 53014, 53030 (Sep. 17, 2007) (acknowledging that safety concerns may prevent a survivor of crime from obtaining a passport or visa on a normal timeline); [Matter of 13655649 \(AAO Aug. 10, 2021\)](#) (unpublished) (recognizing U applicant suffered substantial harm on the basis of, *inter alia*, “continu[ing] to endure chronic headaches, memory loss, and other related emotional trauma”); [Matter of 19271107 \(AAO Feb. 28, 2022\)](#) (unpublished) (basing finding of substantial harm in large part on therapist’s psychological evaluation detailing criteria for diagnoses of PTSD and PDD, including shame, anxiety, avoidance, concentration difficulties, and difficulties expressing oneself).

for the Form I-192 to be granted.³⁴ Although USCIS has stated it will consider *nunc pro tunc* requests on a case-by-case basis even after the applicant has adjusted status, ASISTA is aware of multiple recent waiver attempts after the Form I-485 approval that have been denied on the ground the person no longer held U status after adjusting.³⁵

In addition, while a *nunc pro tunc* Form I-192 can be pending at the same time as a Form I-485, USCIS has treated as a negative discretionary factor an applicant's failure to seek the waiver sooner, especially where USCIS first raises the unwaived ground itself in an RFE, rather than the applicant doing so independently and affirmatively. Separately, ASISTA is aware of at least one occasion where a U adjustment of status application was pending concurrently to a *nunc pro tunc* waiver request, and the agency adjudicated the adjustment before the waiver. When it then picked up the *nunc pro tunc* I-192 for adjudication, it denied it because the person no longer held U status, post-adjustment. These adjudication trends and anecdotes lead ASISTA to recommend most noncitizens submit any *nunc pro tunc* waiver request as far in advance of the adjustment application as possible, or, if that is impossible, then at least prior to any RFE.³⁶ There is no need to forgo a potentially fruitful FOIA request to do so, but waiting until you file Form I-485 could negatively impact the waiver for both legal and discretionary reasons.

³⁴ See INA §§ 212(d)(3) (describing waivers for nonimmigrants who are “applying for a nonimmigrant visa” or “seeking admission”) & (d)(14) (describing waivers “with respect to a nonimmigrant described in [INA § 101(a)(15)(U)]”). Despite the language in § 212(d)(3) in particular, it appears rare for USCIS to resist *nunc pro tunc* waiver relief on the basis that U status was already granted (distinct from resisting on the bases that U-adjustment was already granted).

³⁵ In 2023, AILA's VAWA, U, and T Committee, on which ASISTA sits, asked USCIS if it was “possible to file a *nunc pro tunc* I-192” to correct an unwaived inadmissibility ground discovered “after U/T adjustment has been granted.” USCIS, Stakeholder Meeting: Q&As from the American Immigration Lawyers Association (AILA) and Coalition partners meeting, 9 (May 8, 2023), *available at* https://www.uscis.gov/sites/default/files/document/outreach-engagements/AILA_Meeting_with_USCIS_on_U_Visa_T_Visa_and_VAWA_petitions-May_2023.pdf.

The answer was not that there is a policy or interpretation that such post-adjustment waivers are unlawful, but rather, “Because such cases are decided on an individualized basis, we are unable to provide a uniform policy response to this question.” *Id.* This could suggest it may sometimes be appropriate to seek to waive a late-breaking inadmissibility ground even after your client has adjusted, and/or to fight back if USCIS seems inclined to deny a waiver on the ground it already approved the Form I-485.

³⁶ One exception may be where a waiver seems likely to be denied. There, the survivor may benefit from quietly enjoying their four years in U status rather than drawing USCIS's attention to an unwaived ground that could cause revocation sooner. Of course, if your client is in this position, you may have your own ethical duty of candor to the tribunal if you know the benefit was ill-won: consult your state ethics hotline to balance this against your duty of loyalty to the client. *But see* 8 CFR § 214.14(h)(2)(i)(B) (making revocation of U status approved “in error” only a *discretionary* basis for revocation). You might also wait to request a *nunc pro tunc* waiver where the nonimmigrant's derivatives have not all assumed U status yet. If the waiver were denied and triggered revocation of the U principal's status, derivatives who had not yet been granted U status would be categorically unable to obtain it, whereas those already approved would be subject only to the risk of a discretionary revocation on notice. *Id.* at § 214.14(h)(2)(i)(E).

Example: Client obtained a U visa with prior counsel, after being granted a waiver of multiple grounds of inadmissibility shown on his Form I-192 approval notice. He now comes to you for U-based adjustment. While answering Form I-485 questions, Client discloses that he crossed the border with his young, undocumented son. When you ask why he didn't also waive INA § 212(a)(6)(E)(i) (smuggling), he tells you he thought smuggling only meant transporting strangers for money. He also says he told prior counsel he was with his son, who subsequently obtained asylum, and was never informed this would need a waiver. Now, the son has a severe medical condition and Client is his caregiver.

Your next steps should be:

1. Submit a FOIA request to USCIS for the officer's notes, "Form I-192 approval sheet," and "U-1 checklist," to verify if the approval notice accurately reflects what USCIS meant to waive. You should also request a copy of Client's U application from prior counsel (or through FOIA) to see if, unknown to Client, there was a request to waive smuggling, or a disclosure in the declaration of having entered with the son.
2. If waiver of the smuggling ground was requested, or the underlying facts disclosed, contact the appropriate service center to request a corrected Form I-192 approval notice.
3. If the waiver request or disclosure was not made, the likely best course is to file a new Form I-192 *nunc pro tunc*. You should file it prior to filing for adjustment. Include evidence of, and highlight in your brief or cover letter, Client's sympathetic, reasonable explanation for not requesting the ground to be waived before (mistaken understanding of "smuggling," poor advice of counsel), along with sympathetic equities regarding the son's medical circumstances, Asylum approval, and Client's caregiver responsibilities.
4. Finally, if you see Client marked "no" on the I-918 to helping someone enter the US illegally, and you determine that it was not a willful misrepresentation, still ask for USCIS to waive the misrepresentation, as well as the smuggling, in the event the agency disagrees.

c. Note: An Unwaived EWI after I-918 or I-918A Approval is Different!

Beware that in certain circumstances, an unwaived entry without inspection may be a late-breaking inadmissibility with especially severe consequences. Such is the

case where USCIS believed your client to be outside the country when issuing the I-797 approval notice of their I-918 or I-918A, with instructions to consular process, yet the client actually entered without inspection. In this scenario, your client has no Form I-94—the status-granting document—and has not actually been admitted in U status at all. Were they to do nothing to rectify the situation, they would find themselves ineligible for adjustment in three years, for never having started accruing continuous physical presence as a U nonimmigrant. See INA § 245(m)(1)(A).

How to rectify the situation depends on the timing of the EWI. If the EWI occurred *before* the I-918 or I-918A approval, but was simply unknown to USCIS, you will need to convince USCIS of such timing and follow one of the options described above to deal with the unwaived inadmissibility under INA § 212(a)(6)(A). You will also need to request from USCIS a new I-918 or I-918A approval notice, with a Form I-94 attached at the bottom. See 8 CFR §§ 214.14(c)(5)(i) & (f)(6)(i)&(ii).

However, if the EWI occurred *after* the I-918 or I-918A approval, as happened with some desperate individuals during the consular closures of the COVID-19 pandemic, USCIS now takes the position it cannot grant admission by issuing an I-94 itself, and the only option is to follow the visa process at the consulate and be admitted by CBP at arrival. This is a relatively new departure from prior practice, and there exist some arguments it is improper, but the fact remains that current USCIS policy is to require your client to return to their home country, seek a new waiver if they were in the US long enough to trigger inadmissibility under INA § 212(a)(9)(B), and go through the consular process for a U visa before they could be admitted as a U nonimmigrant.³⁷

C. Inadmissibility Ground Triggered After Admission in U Status, and Before Adjustment of Status

When a new inadmissibility ground arises *after* your client is admitted in U status, but before their adjustment of status application is adjudicated, this may be a surprise, but it is not technically a “late-breaking inadmissibility.” It also does not require a waiver, because admissibility is not actually required for adjustment under INA § 245(m).³⁸ Instead, the substantive question for U-based adjustment of status is whether admission would be “justified on humanitarian grounds, to ensure family unity, or . . . otherwise in

³⁷ If you have a client in this situation and are an ASISTA member or work for an organization that receives Legal Assistance for Victims (LAV) or STOP funding from the Office on Violence against Women (OVW), you can schedule a technical assistance (“TA”) appointment with an ASISTA attorney for the latest information on this policy and ideas of arguments to resist it. For information on accessing technical assistance, visit <https://asistahelp.org/programs/>.

³⁸ The sole exception is that applicants must not fall under INA § 212(a)(3)(E) (barring “[p]articipants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing”).

the public interest.” INA § 245(m). Any new ground of inadmissibility that arises between the grant of U status and adjustment of status is relevant only inasmuch as it bears on that question or could influence USCIS’s willingness to exercise discretion.³⁹ Indeed, depending on the inadmissibility ground, the facts surrounding it, and your state’s ethics rules, you may not even be required to disclose it as a discretionary matter.⁴⁰

However, if you do disclose the existence of the new ground, which is highly recommended if it is discoverable through background checks or answers on Form I-485, you can choose with your client whether to do so immediately or wait for a potential RFE. In most cases, ASISTA recommends not waiting for an RFE to supplement the application, but you are best-positioned to evaluate the risks and rewards in your case.

The risk of immediately disclosing is that interfiled, supplementary evidentiary submissions sometimes do not find their way to the file, and it can be hard to verify if they were received.⁴¹ Another drawback is that, early on, you may have less positive evidence to submit to counterbalance the new ground, whereas your client could gather more if you waited. Meanwhile, the risk of waiting for an RFE is that USCIS is not *required* to issue an RFE and may choose to deny instead;⁴² USCIS may also view the case less positively if it has to point out a ground as undisclosed, compared with if an applicant affirmatively brings it up—though there is no official policy on this.⁴³

Whenever you disclose the new ground, you should advocate for a favorable decision by submitting ample evidence in support of both the statutory criteria for approval—advancement of humanitarian, family unity, or public interests—and positive discretion.⁴⁴ While the statutory criteria do not have definitions in the INA or regulation, the USCIS Policy Manual has a long list of factors that may be relevant to discretion in any immigration case at 1 USCIS PM E.8. Many factors relate back to both humanitarian interests and family unity, and others could arguably be couched as public interest indicators, as well as equities weighing in favor of positive discretion. This list of

³⁹ See 8 CFR § 245.24(d)(11) (“USCIS may take into account all factors, including acts what would otherwise render the applicant inadmissible, in making its discretionary decision on the application.”).

⁴⁰ As always, your client must answer the Form I-485 questions truthfully. Whether (and when) there is also an ongoing ethical duty to clarify answers if a new fact arises after submission, but is relevant only to discretion and not eligibility, is the subject of debate among Ethics experts. *But* see Model Rules of Prof’l Conduct R. 3.3 (Candor toward Tribunal).

⁴¹ For the latest best practices on supplementing applications, see [ASISTA, Hot Tips for Using Service Center Hotlines and Supplementing Pending Petitions \(Jan. 22, 2024\)](#).

⁴² 8 CFR § 103.2(b)(8)(iii).

⁴³ See, e.g., [Gail Pendleton, Overcoming Inadmissibility for U Applicants \(2018\)](#) (quoting USCIS personnel as preferring applicants to “acknowledge and explain as much as possible to not appear evasive” and “include and explain as much as possible upfront so your client will appear more credible.”).

⁴⁴ 8 CFR § 245.24(d)(10) & (11). Note that the statutory criteria involve a disjunctive list (humanitarian factors, family factors, or public interest factors). If your client’s case is especially strong on one but weak on another, you can lean heavily on the strong one(s) and argue the case need not be strong on all three.

factors is not exclusive, and you may discuss with your client additional types of evidence that could support a favorable decision in their case.⁴⁵ If the inadmissibility is crime-related, it will be critical to help your client document the three “Rs” of taking responsibility for the misstep, showing remorse for it, and demonstrating rehabilitation, as discussed further below. In any U-based case, it is also frequently effective to connect negative factors to your client’s (or the principal applicant’s) victimization or mental state pre-recovery, and to highlight with positive evidence the way the client’s actions have strengthened law enforcement efficacy, as these are the purposes behind the U visa and U adjustment programs.⁴⁶

Separately, if the inadmissibility offense is especially serious or there are numerous adverse factors, USCIS is authorized to require a “clear[]” showing that “denial of adjustment of status would result in exceptional and extremely unusual hardship.” 8 CFR § 245.24(d)(11). In ASISTA’s observation, USCIS rarely sends RFEs for such evidence, however those with difficult cases may wish to document hardship unprompted. You can do this in ways similar to what is done with certain inadmissibility waivers or cancellation of removal, but with a special eye toward hardship to the principal U recipient in their recovery from victimization. Consult, for example, the USCIS Policy Manual on Extreme Hardship for waivers at 9 USCIS PM B.5 and on Extreme Hardship as an Eligibility Requirement for a T Visa at 3 USCIS PM B.2.E. Note that, while hardship to the principal is often the most persuasive, the hardship need not befall any one specific person. Think broadly and creatively about how your client’s inability to adjust status could affect those around them as well as themselves.

Example: Six months after submitting Client’s U-based Form I-485, Client tells you she forgot to mention a marijuana possession conviction from right after her U visa was granted. She says she had been experiencing psychological distress related to the crime she suffered and used to self-medicate with marijuana. She says that after receiving her U visa she was able to start accessing therapy and does not smoke anymore. She says she forgot about it, as part of the past she tried not to think about.

Thankfully, despite this potentially meeting the definition of a controlled substance inadmissibility, it will not require a waiver, because U-based

⁴⁵ For more ideas on humanitarian and public interest factors DHS has recognized elsewhere as salient for survivors of crime, you should also review the extreme hardship factors set forth in the T visa regulation, many of which bear on questions besides hardship, as well as the USCIS Policy Manual’s entry defining the “national interest” for purposes of a T-visa waiver under INA § 212(d)(13). 8 CFR § 214.11(i)(2) (before Aug. 28, 2024) or 8 CFR §214.209(b) (post-Aug. 28, 2024); 9 USCIS-PM O.3.B.

⁴⁶ It can be helpful to cite and quote the preamble to the U visa legislation, as well the federal register explanation behind the regulations to remind adjudicators of these purposes. See *generally* Pub L. 106-386, div. B, title V, § 1513(a)(2) (Oct. 28, 2000); 72 Fed. Reg. 53014 (Sep. 17, 2007).

adjustment under INA § 245(m) does not require a showing of admissibility, which is what waivers overcome. However, Form I-485 instructions require adjustment applicants to submit criminal records,⁴⁷ and USCIS will also conduct a criminal background check and biometrics collection. Discuss the facts surrounding the arrest with Client, how she feels about it now and what she learned and does differently today. Ask about the treatment she mentioned and other indicators of her recovery and rehabilitation. Ascertain what evidence exists for these. Gather these items together and help the client draft an affidavit demonstrating her responsibility, remorse, and rehabilitation (the three Rs) regarding both the marijuana conviction and nondisclosure of it. Add other evidence that adjustment still advances humanitarian, family unity, or the public interest, if you have it. Submit these as soon as possible, without waiting for an RFE, following ASISTA's guidance on supplementary filings.⁴⁸

a. Note: Assume Any Criminal History Needs Substantial Positive Counterbalances

One common USCIS refrain in U-based adjustment of status is that discretion is not warranted for victim-based relief where the applicant themselves “created a victim” through alleged or proven criminal activity. Another trend is the harsh regard for drug or DUI-related arrests, especially where there is more than one and they are recent. Because the question is about discretion, not inadmissibility, mere arrests, without conviction, have been reported to result in denials of U-based adjustment of status.⁴⁹ In addition, by regulation, “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.” 8 CFR § 245.24(d)(11) (emphasis added). Practitioners should be prepared for USCIS to apply this type of reasoning broadly, and should plan to both (a) submit ample positive discretionary evidence with the initial submission, and (b) advise the client to continue to build positive equities and preserve documentation of such activities after submission, in

⁴⁷ They require submission of not just court, but arrest records. For considerations on whether to submit arrest reports in conjunction with a survivor-based application, see authorities cited in n. 49, *infra*.

⁴⁸ See [ASISTA, Hot Tips for Using Service Center Hotlines and Supplementing Pending Petitions \(Jan 22, 2024\)](#).

⁴⁹ For arguments against reliance on arrest reports alone, see, e.g., [IDP et al., Amicus Brief in Matter of -- \(2018\)](#); [Sanctuary for Families Memorandum on Police Reports in Affirmative Cases](#); [Rubio Hernandez v. United States Citizenship & Immigration Servs., C22-904 MJP \(W.D. Wash. Nov. 7, 2023\)](#) (holding that it is legal error for USCIS to place “substantial adverse weight on the fact of several arrests” if the record “contains no evidence explaining their facts and circumstances” and the noncitizen “was either found not guilty or where charges were dismissed”); *Matter of Arreguin*, 21 I&N Dec. 38 (B.I.A. 1995).

anticipation of an RFE. Rehabilitation efforts and evidence, in particular, should be prized, though never conceded to be absolutely required.⁵⁰

Unfortunately, in humanitarian cases like U-based adjustment, USCIS has recently questioned whether a person can sufficiently demonstrate rehabilitation if they are still serving or only recently completed a sentence.⁵¹ It takes the position that good behavior in a controlled environment, including probation, is inadequate to demonstrate how the person will conduct themselves without such supervision.⁵² If your client is in this situation, consider researching decisions in your federal jurisdiction on this topic, or related questions of rehabilitation in the criminal context. Strong, helpful language may exist regarding requirements to consider the possibility that a person has been reformed through the criminal justice system.⁵³ As always, you should also submit as much positive discretionary evidence as possible with your initial application, and prepare them to assiduously work on producing more positive equities and evidence while they wait for an RFE. If USCIS denies your client as part of this trend, ASISTA members and OVW funding recipients are encouraged to set a TA appointment with ASISTA.⁵⁴ Moreover, all practitioners should consider filing an I-290B motion to reopen, even as a late filing, if necessary, with more evidence of rehabilitation once the sentence is complete. See 8 CFR § 103.5(a)(1)(i); *Matter of V-H-M-T-* (AAO, Sep. 28, 2016) (unpublished). Those with the opportunity to adjust through a family member or other route may also find less harsh scrutiny in that context, at least in some field offices.

D. Inadmissibility Grounds Already Known and Waived Before Adjustment

In recent years, USCIS has issued increasing numbers of RFEs, NOIDs, and decisions in U-adjustment cases, where it penalizes the noncitizen for inadmissibility

⁵⁰ It seems proper to consider rehabilitation for the “public interest” prong of a U-based adjustment application, but practitioners may do well to argue that there is no requirement in statute or regulation for a complete reform to be shown, particularly if the person is on the right path and other positive equities are present. *E.g.*, *Arreguin*, 21 I&N Dec. at 41 (noting, in the context of INA § 212(c) relief, that “[a] clear showing of reformation is not an absolute prerequisite to a favorable exercise of discretion” in every case involving a criminal record).

⁵¹ *E.g.*, [Matter of V-R-S-, ID 1708471 \(AAO, Sept. 21, 2018\) \(unpublished\)](#).

⁵² *Id.*

⁵³ *E.g.*, *Graham v. Florida*, 560 U.S. 48 (2010) (noting that state legislatures design penal systems based on their findings as to “what rehabilitative techniques are appropriate and effective,” and holding that increased maturity after a youthful offense, as well as acts undertaken from prison to “atone for [the] crime[] and learn from [the] mistakes” must be considered as possible indications a person “is fit to rejoin society,” not dismissed out of hand for having been completed while under sentence); *Matter of Arreguin*, 21 I&N Dec. at 40 (“[T]he applicant’s acceptance of responsibility for her crime and her achievements while in prison are favorable indicators of efforts at rehabilitation which we take into account in weighing the equities of her application [emphasis added].”). ASISTA thanks Schuyler Pisha, attorney at Greater Boston Legal Services, for helping develop this argument.

⁵⁴ See <https://asistahelp.org/programs> and n. 37, *supra*.

grounds that were triggered *and already waived or addressed at the U visa phase*. For instance, the agency commonly seeks extensive information about arrests and convictions that were disclosed in a U-visa petition and that it either waived, or found not to be an inadmissibility ground at all. Perhaps this seems the opposite of a problem with a late-breaking ground, in that this information is very much already on the radar of the attorney and USCIS, but it is discussed here because the resurgence of these grounds as a hurdle for future applications often takes practitioners by surprise.

To justify its renewed, even increased scrutiny, USCIS often asserts that LPR status is a more comprehensive, permanent benefit than U status, so it deserves a more comprehensive, exacting review to obtain. However, this assertion is not grounded in the law and practitioners can argue it exhibits an abuse of discretion. After all, the statute governing adjustment of status for U recipients is actually *more generous* and allows approval on *more grounds* than the statute on U status applicants who are inadmissible. Unlike U nonimmigrant status, INA § 245(m) does not concern itself with inadmissibility grounds at all. Although the *regulation* at 8 CFR § 245.24(d)(11) permits USCIS to consider inadmissibility grounds in connection with U-adjustment applications, the statute permits inadmissible noncitizens to adjust in broader circumstances than they can receive U nonimmigrant status, calling for approval to be “justified on humanitarian grounds, to ensure family unity, *or . . . otherwise in the public interest.*” INA § 245(m)(1)(B) (emphasis added). By contrast, humanitarian grounds and family unity are not sufficient bases for approving a waiver of inadmissibility under INA § 212(d)(14): for U applications, only waivers justified in the “public or national interest” can be approved. These differences arguably evince a Congressional intent for applicants to succeed at adjustment more readily, or on additional bases, than at the U visa phase. Thus, it is arguably an abuse of discretion for the same facts to lead to approval under the stricter standard but denial under the more generous.⁵⁵

Of course, just because these arguments *could* be made in every case does not mean, necessarily, that they *should* be. If you receive an RFE seeking to relitigate matters already successfully addressed at the U-visa stage, consider whether your client’s case for favorable discretion has gotten better or worse. If your client is now a better candidate for favorable discretion anyway, the fastest route to success may be simply to give USCIS what it requests and add arguments and documentation about how the client has demonstrated even more rehabilitation, for an even longer period of time, compared with the last time USCIS looked at the issue and decided it in their favor. Alternatively, if your client has added both negative and positive discretionary factors to their ledger, it may be worthwhile to resist USCIS’s focus on the public

⁵⁵ See 1 USCIS-PM E.8.B.1. (characterizing BIA decisions as implying that an exercise of discretion must not be “arbitrary, inconsistent, or dependent on intangible or imagined circumstances”).

interest alone, and draw attention to your client’s evidence that humanitarian grounds and family unity would separately be served by their admission as an LPR.

If your client is ultimately denied adjustment based only on a fact raised and waived as an inadmissibility at the U visa phase, some practitioners and clients may wish to pursue federal litigation. At least one federal district court has suggested that conflicting conclusions in an adjustment case and a waiver case may be justified only if USCIS is reviewing a different, more negative record in the adjustment case. *Rubio Hernandez v. United States Citizenship & Immigration Servs.*, C22-904 MJP, * 20-21 (W.D. Wash. Nov. 7, 2023).⁵⁶ Even if you do not plan to help your client pursue federal litigation, positioning them to do so with a different attorney may be best practice.

E. Inadmissibility Ground Existed at the Time of U Approval, but Not Discovered until After Adjustment of Status

Perhaps the latest of late-breaking inadmissibility grounds is the one that existed before your client’s U visa was decided, but did not come to light until after approval of both the U visa *and* U-based adjustment of status. Unfortunately there is almost nothing that can be done to “fix” this problem, and your main role will be to educate the client on the risks they face and defenses they may have available if the error is discovered.

Often the problem of an unwaived ground emerges when the person seeks counsel for naturalization. If, in your intake or representation, you learn that the person’s U visa was improvidently granted, you should advise them that proceeding with a petition for naturalization may trigger negative action, and even removal proceedings, by DHS. Under the INA, naturalization requires a person to have been “lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act.” INA § 318; *see also* INA § 316(a)(1). Courts have also held this language to require that the person’s LPR status have been conferred in a manner both procedurally regular and compliant with all substantive elements. *See, e.g., Turfah v. U.S. Citizenship & Immigration Servs.*, 845 F.3d 668, 671-73 (6th Cir. 2017).⁵⁷ As such, if USCIS learns of the unwaived ground, it is likely to find the client was not substantively eligible for U status, thus not substantively eligible for adjustment of status, and, further thus, not substantively eligible to naturalize. Furthermore, depending on the NTA policy of USCIS at the time it is deciding this person’s N-400, such a finding of ineligibility could be accompanied by a notice to appear in immigration court.

⁵⁶ Available at <https://www.nwirp.org/our-work/impact-litigation/assets/rubio/29%20order%20granting%20Ps%20MSJ.pdf>.

⁵⁷The *Turfah* court issued its ruling in an exercise of *Chevron* deference to the BIA under *Matter of Kolomantangi*, 23 I&N Dec. 548 (BIA 2003).

Ultimately, whether to proceed despite the risk of denial and/or immigration enforcement will come down to the client's risk tolerance, in light of current national USCIS policy, local USCIS Field Office practices, your own ethical obligations surrounding disclosure of the late-breaking inadmissibility, and your client's prospects for successfully defending themselves from removal. To start, you should carefully review USCIS's website for its most up-to-date policy on NTAs and any special considerations for survivors or applications perceived to have involved fraud, if that is present in this person's case. You should also consult with local colleagues or listserv members about how frequently your client's USCIS Field Office issues NTAs or even call ICE to detain people at their interviews. Be sure to tell the client not only what defenses they may have from removal, but whether you would have the capacity to represent them if they received an NTA.

Practice Tip: Be Careful with Travel

If a noncitizen with unwaived inadmissibility grounds travels internationally, they may be assessed for admissibility upon return and refused admission or issued an NTA'd. If they currently hold U status, they may need to file a new Form I-192 waiver application from abroad to overcome any previously unwaived ground. If they currently hold LPR status, they will only be assessed for admissibility if they meet one of the criteria for applicants for admission in INA § 101(a)(13)(C). If they travel in those circumstances, their unwaived ground of inadmissibility may be more likely to come to light and cause serious trouble for them to return and resume status.

Unfortunately, you may only learn of an undisclosed and unwaived ground of inadmissibility at or after the naturalization interview. If so, your only option may be to assert that it would be error for USCIS to deny naturalization for not waiving the ground, because adjustment of status was still lawfully granted.

The argument in support of naturalization is that the U adjustment *statute* does not actually require a substantively lawful admission in U status, it requires only an admission in U status. The phrase "*lawfully admitted* [emphasis added]" appears only in the U adjustment *regulation*. Compare INA § 245(m)(1) with 8 CFR § 245.24(b)(2)(i). Elsewhere in the adjustment context, the statutory phrase "admitted into the United States," (where not accompanied by the word "lawfully") has been held to require only a procedurally regular admission, rather than a substantively lawful one. *E.g., Matter of Quilantan*, 25 I&N Dec. 285, 290 (BIA 2010) (requiring only a procedurally regular admission for the element of "inspect[ion] and admi[ssion]" in an adjustment application under INA § 245(a)) ("We find that, by themselves, the terms 'admitted' and 'admission,' as defined in section 101(a)(13)(A) of the Act, continue to denote procedural regularity for purposes of adjustment of status, rather than compliance with substantive legal

requirements.”). As such, USCIS’s regulation “interpreting” the U adjustment statute by adding a requirement for a substantively lawful admission in U status is *ultra vires* and should not control. See, e.g., *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) (“A term appearing in several places in a statutory text is generally read the same way each time it appears.”); *Medina Tovar v. Zuchowski*, 982 F.3d 631, 635 (9th Cir. 2020) (en banc) (“[W]e have held that an agency may not add a new requirement when Congress has specified the criteria for a particular immigration benefit.”).

On this basis, you can argue that, even if the client’s unwaived ground meant their U admission was not substantively lawful, that fact did not infect the adjustment approval. All Congress required to lawfully obtain U adjustment of status was a *procedurally regular* grant of U status, and a grant that fails to account for an unwaived inadmissibility is still procedurally regular. Further, the client’s U adjustment was also lawful because there is no requirement for all inadmissibility grounds to have been waived to adjust status under INA § 245(m). In this way, adjustment can have been properly and lawfully granted despite the existence of an unwaived ground at the U stage, and naturalization can be approved under INA § 318. Unfortunately, because USCIS must abide by its adjustment regulations, which require a *substantively lawful* U admission, ASISTA does not expect this argument to be successful before the agency. It is an argument best made as a last resort only, or with the knowledge that success will likely come only through federal litigation, if at all.

Conclusion

Learning of an inadmissibility ground later than expected is always disconcerting and less ideal than identifying it from the outset. Nonetheless, there are often effective strategies to minimize the impact of the late-breaking inadmissibility on the client’s case and long-term prospects. If you have questions about applying any of the techniques or arguments in this advisory, please feel encouraged to reach out to [ASISTA](#), where we can assist our members and recipients or potential recipients of OVW STOP, LAV, or ELSI funding through [one-on-one technical assistance calls](#).⁵⁸

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⁵⁸ For additional information on eligibility for technical assistance, please email manager@asistahelp.org.