Practice Advisory: International Travel and U Nonimmigrant Status[1]
Nov. 7, 2024

Opening Note

This Advisory should be viewed **only as a starting place** for research on how to best counsel survivors. Remember that immigration law and policy is subject to change. Thus, it is imperative to also consider the context of policy, law, and enforcement practices at the time a survivor is considering international travel.

As processing times for U Nonimmigrant Status ("U visa") and related adjustment of status cases continue to increase, immigrant survivors and their qualifying family members face lengthier periods of separation from loved ones in their countries of origin.[2] As a result, many ask about the possibilities for international travel at different stages of the U case. It is important for practitioners to advise all survivors and their family members of the consequences of international travel *early in the representation*, and again any time the client mentions the possibility of travel.

Drawing on insights from an ASISTA-USCIS engagement and other sources, this Practice Advisory will discuss various travel rules and situations at different stages of the U Nonimmigrant Status process. It will also offer practice tips for practitioners.

I. International Travel While U Nonimmigrant Status is Pending

USCIS has not published any guidance on permissible travel options for U Nonimmigrant Status applicants, including applicants with approved bona fide determinations ("BFDs") or waiting list determinations. Unless they depart with advance

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[2] Immigrant survivors and qualifying family members with pending applications for T Nonimmigrant Status and T adjustment may also bring travel questions to practitioners. Travel and T Nonimmigrant Status is beyond the scope of this advisory. ASISTA recommends that practitioners with T-related travel questions consult the Coalition to Abolish Slavery and Trafficking ("CAST"), including CAST's advisements on travel (available at https://castla.app.box.com/s/8c8st4oecmpgulycmn4zlxq3ak84j7ox). The advisements were current at the time of publication. For the most up-to-date information, please visit https://casttta.nationbuilder.com/.

parole, are approved for parole from abroad, or travel with a valid nonimmigrant visa (and are not charged with immigrant intent upon return), U applicants who depart the United States cannot lawfully return until (1) USCIS approves their Form I-918/I-918A, (2) they complete the consular process, and (3) they are admitted with a U visa.

i. <u>U Applicant Travel or Return on Parole or Advance Parole</u>

The U visa regulations provide that parole is available to U visa applicants on the waiting list (as distinct from those granted only a BFD),[3] but USCIS has not created a formal process for requesting or approving this. Although ASISTA is aware of some "conditional parole" grants to waitlisted U applicants abroad, which they can then use to seek parole at a consulate, this is not routinely provided. Moreover, multiple district courts have held that USCIS is not *required* to grant parole or advance parole to waitlisted applicants, especially if it has granted deferred action already.[4] The instructions for Form I-131, the advance parole application, also do not name waitlisted U applicants as eligible to use the form.[5] It is unclear how USCIS would generally treat an I-131 advance parole application for the typical waitlisted U applicant. ASISTA is aware of rumors that some applicants have obtained advance parole from a field office after their BFD was approved, but has not been able to verify these rumors or their circumstances, nor glean any official statement that the agency generally supports this maneuver. When ASISTA asked USCIS at a September 2023 engagement ("September 2023 engagement"), whether applicants on the waiting list and/or with approved BFDs can apply for advance parole, USCIS did not answer the question.[6]

For U applicants who travel abroad without advance parole or another visa, humanitarian parole may be an option to return in particularly compelling cases. USCIS has stated that humanitarian parole should not "be used solely to avoid normal visa processing procedures and timelines."[7] Thus, the U applicant will need a reason for the parole *in addition to* a desire to avoid waiting for a final U visa adjudication. If a

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[3] *See* 8 CFR § 214.14(d)(2) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list."). Note, however, that the regulations have not been updated since USCIS created the current, robust BFD system that largely displaces the waitlist as the stage where the agency considers granting deferred action.

[4] *See*, *e.g.*, *De Sousa v. U.S. Citizenship and Immigration Servs*., No. 23-CV-04657-RFL 2024 WL 1115550, at *8 (N.D. Cal. Mar 14, 2024) ("As such, the plain language of § 214.14(d)(2) makes clear that parole is a decision committed to the agency's discretion. Under § 214.14(d)(2), USCIS is given the option of choosing to grant either deferred action or parole, and is not required to grant both."). As of publication of this advisory, litigation on this issue is pending before the Court of Appeals for the Eleventh Circuit. Reach out to ASISTA for more information on this case and the arguments it makes.

[5] *See* UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., Instructions, Form I-131, APPLICATION FOR TRAVEL DOCUMENTS, PAROLE DOCUMENTS, AND ARRIVAL/DEPARTURE RECORDS, at 7-8 (June 17, 2024), available at https://www.uscis.gov/sites/default/files/document/forms/i-131instr.pdf (*hereinafter* Form I-131 Instructions).

[6] ASISTA, *Q & A with USCIS Humanitarian Affairs Division and Service Center Operations Directorate (SCOPS)*, at 3 (Sept. 18, 2023), available at https://asistahelp.org/wp-content/uploads/2024/05/2023-OPS-September-ASISTA-Meeting.docx.pdf (hereinafter *USCIS Q & A*).

[7] *Humanitarian or Significant Public Benefit Parole for Individuals Outside the United States*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/humanitarian_parole (last reviewed/updated Aug. 19, 2024).

practitioner decides to pursue humanitarian parole for a U visa applicant, it is important to focus on any harm that they face while abroad. The practitioner should especially highlight any relationship between the harm and the qualifying crime.

For example, a survivor who is being credibly threatened abroad by the perpetrator of the U visa qualifying crime may have a compelling case for humanitarian parole.

Even in these compelling cases, practitioners should advise U visa applicants *before* departure that return on humanitarian parole is not guaranteed. They should also note that USCIS does not publish average processing times for humanitarian parole requests, and that ASISTA members regularly report waiting close to a year or more for a decision. Seeking humanitarian parole from Customs and Border Protection (CBP) at a border, as through a CBP One appointment, is also possible, with similar provisos about documenting compelling circumstances and preparing for lengthy wait-times. For more information on humanitarian parole, ASISTA recommends USCIS's website and Catholic Legal Immigration Network ("CLINIC")'s "All About Parole" practice advisory.

ii. U Applicant Travel on Another Valid Nonimmigrant Visa

Some U applicants may have other valid nonimmigrant visas that allow for international travel, such as visitor or student visas. There are no binding authorities on how traveling with such visas will impact a U applicant, but there are some informal sources of information that may be encouraging, as long as their predictive limitations are understood.

USCIS stated in the September 2023 engagement that traveling on a valid visa "would have no impact" on deferred action pursuant to a U BFD or waitlist approval.[8] Whether this will continue to be the policy of USCIS is unknown.

Another consideration when traveling with certain nonimmigrant visas is immigrant intent. Because U Nonimmigrant Status is a path to citizenship, it is conceivable that a customs officer could have questions about immigrant intent. ASISTA is aware of U applicants who successfully traveled with valid nonimmigrant visas and has not heard of immigrant intent issues in these cases, but without formal guidance that experience is not guaranteed. Practitioners should also advise clients to be truthful when speaking with officers, since untruthful statements could trigger inadmissibility under INA § 212(a)(6)(C)(i) (fraud or willful misrepresentation).

iii. U Applicant Travel on Advance Parole Obtained Through Independent Basis (and Special Considerations)

While there is no official guidance on advance parole for U applicants, some applicants may be eligible for advance parole or similar travel authorization on an independent basis, including through Deferred Action for Childhood Arrivals ("DACA") or Temporary Protected Status ("TPS"). USCIS stated at the September 2023 engagement that such

[8] *USCIS Q & A*, *supra* note 6, at 3.

travel "should have no impact" on the noncitizen's deferred action pursuant to their U BFD or waiting list placement.[9] Note, however that the USCIS may change this guidance in the future.

USCIS cannot grant advance parole to noncitizens in removal proceedings (including noncitizens with unexecuted removal orders).[10] **Thus, noncitizens seeking to travel on advance parole must have their removal proceedings terminated.**

Finally, noncitizens with criminal histories or other negative equities or grounds of inadmissibility should understand that there is a risk that they may not be able to return to the United States after traveling on advance parole, or they may be issued a Notice to Appear (NTA) in immigration court. The ultimate decision whether to allow the noncitizen to return to the United States is discretionary by DHS officials (usually CBP), at each entry.[11] An approved application for advance parole from USCIS does not guarantee successful return to the United States, and practitioners should advise clients accordingly.[12]

Special Note About the Three- and Ten-Year Bars

Matter of Arrabally and Yerrabelly, 25 I&N Dec. 771, 779 (BIA 2012) held that a departure on advance parole is not a "departure" for purposes of inadmissibility under INA § 212(a)(9)(B)(i)(II), the 10-year unlawful presence bar. USCIS currently interprets the decision to apply to the 3-year unlawful presence bar as well.[13] However, the Department of State's interpretation is that the decision does not apply to noncitizens applying for visas.[14] Thus, a U applicant who has accrued prolonged unlawful presence, traveled on advance parole, and later sought a U visa at a U.S. embassy or consulate will require a waiver of the applicable subsection of INA § 212(a)(9)(B).[15] In addition, *Matter of Arrabally and Yerrabelly*

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[9] *Id*.
[10] Form I-131 Instructions, *supra* note 5, at 10.
[11] *See* Form I-131 Instructions, *supra* note 5, at 9 ("As noted above, DHS will make a separate discretionary decision whether to parole the noncitizen into the United States each time they present an Advance Parole Document to DHS to request parole into the United States.").
[12] *See id*. at 9 ("The issuance of an Advance Parole Document does NOT entitle a noncitizen to parole and does not guarantee that DHS will parole the noncitizen into the United States upon their return" [emphasis in original]).
[13] *Unlawful Presence and Inadmissibility*, UNITED STATES CITIZENSHIP AND IMMIGRATION SERVS., https://www.uscis.gov/laws-and-policy/other-resources/unlawful-presence-and-inadmissibility (last reviewed/updated Sept. 5, 2024) ("While the Board of Immigration Appeals, in *Matter of Arrabally and Yerrabelly,* stated that its decision was limited to INA 212(a)(9)(B)(i)(II), the board's reasoning in *Matter of Arrabally* applies equally to INA 212(a)(9)(B)(i)(I). For this reason, we apply the decision to both INA 212(a)(9)(B)(i)(I) and (II)."). As of this writing, the USCIS Policy Manual section on the unlawful presence grounds does not mention this interpretation. *See* 8 USCIS-PM O.6
[14] U.S. DEPARTMENT OF STATE, AILA DOS LIAISON COMMITTEE LIAISON MEETING WITH THE DEPARTMENT OF STATE 8-9 (Oct. 10, 2024), available at https://travel.state.gov/content/dam/visas/AILA/AILA%20Fall%202024%20DOS%20Liaison%20Agenda%2010-10-2024.pdf.
[15] *Cf. id*.

does not extend to *other* grounds of inadmissibility that are triggered by departure, such as INA § 212(a)(6)(B) (failure to attend removal proceedings without reasonable cause) and INA § 212(a)(9)(A) (departure after a removal order).[16] Practitioners should advise U applicants who travel on advance parole accordingly and should determine whether a Form I-192 (or amendment to an existing I-192) is necessary after such a departure.

iv. U Applicant Travel in General: Important Implications

Before a client with a pending U application departs without authorization to allow their lawful return, practitioners should advise them of the significant possibility of having to wait outside the U.S. for several years, or even decades. Practitioners should also advise principal applicants, even those who have a lawful avenue to return, of the need to continue complying with reasonable requests for assistance from the certifying law enforcement agency,[17] and the difficulties they may have doing so from abroad. The survivor should give the certifying agency their contact information once they have left the United States, especially if the case is still open.

If a U visa applicant does depart and will remain abroad throughout the pendency of their case, the practitioner must amend Form I-918/I-918A to inform USCIS of the departure and request that the appropriate consulate be notified of an approval. Additional amendments to the I-918 may be needed if the departure changed the answer(s) to any question(s) on the form. The applicant may also need to file Form I-192 (if one was not filed already) or amend an existing Form I-192 if the departure triggered any ground(s) of inadmissibility, such as INA § 212(a)(9)(B) (the 3 or 10 year unlawful presence bars). For best practices on amending forms and supplementing filings, please consult ASISTA's *Hot Tips for Using Service Center Hotlines and Supplementing Pending Petitions* resource.

II. International Travel with Approved U Nonimmigrant Status (*Without* Pending Application for Adjustment of Status or Independent Basis for Advance Parole or Similar Travel Permission)

In theory, approved U Nonimmigrants have multiple mechanisms available to travel abroad and lawfully reenter the United States, but there are many obstacles that practitioners and noncitizens should be aware of *before* departure.

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[16] *Cf. Matter of Arrabally and Yerrabelly*, 25 I&N Dec. at 880 ("We emphasize that we hold only that an [noncitizen] cannot become inadmissible *under section 212(a)(9)(B)(i)(II)* solely by virtue of a trip abroad undertaken pursuant to a grant of advance parole. Our decision does not preclude a trip under a grant of advance parole being considered a "departure" for other purposes, nor does it call into question the applicability of any other inadmissibility ground.") (emphasis in original).

[17] *See* 8 CFR § 214.14(b)(3) ("The [noncitizen] has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which his or her petition is based, and since the initiation of cooperation, has not refused or failed to provide information and assistance reasonably requested.").

The first mechanism for travel and return is for the noncitizen to seek a U Nonimmigrant Visa from a consulate while they are abroad, and then use that visa to reenter the United States in U status. However, there are several practical hurdles in these cases. First, to maintain eligibility for U-based adjustment of status, U Nonimmigrants must attain three years of continuous physical presence ("CPP") while in U status, and they must not disrupt it thereafter.[18] U Nonimmigrants who are outside the United States for a single period of more than 90 days, or an aggregate period of more than 180 days, are deemed to have broken CPP *unless* "the absence is in order to assist in the investigation or prosecution or unless an official involved in the investigation or prosecution certifies that the absence was otherwise justified."[19] It can be very difficult for a U Nonimmigrant to return to the United States in time, since the consular process may take several months. Further, if the noncitizen triggers a ground of inadmissibility upon departure, the practitioner must file Form I-192 (or amend an existing Form I-192) to obtain a waiver from USCIS, which takes additional time.

It is not *impossible* for the noncitizen to receive the approved I-192 and U visa, and be admitted to the United States in U status within the required time period, but it is highly unlikely without significant diligence and advocacy on the part of the practitioner and noncitizen.[20] If the process cannot be completed within the required time period, the Administrative Appeals Office ("AAO") has stated in non-precedent decisions that it is possible to re-accrue CPP.[21] Despite the possibility of re-accruing CPP, it remains risky for a U Nonimmigrant to travel abroad without a multi-entry visa or advance parole.

The second mechanism is for the noncitizen to use a multi-entry U visa. The U.S. Department of State ("DOS") often grants such visas to noncitizens if USCIS approved their I-918/I-918A while they were abroad. U Nonimmigrants traveling on multi-entry visas still must maintain CPP and should plan short trips that come nowhere close to exceeding the 90 or 180 day time periods mentioned above. They should also consider the conditions in the country to which they wish to travel, and assess whether a prompt return to the United States is likely. Even with a multi-entry visa, it is risky for a U Nonimmigrant to travel to a country that is currently experiencing war, civil unrest, or any other circumstance that may prevent a prompt return to the United States.

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[18] *See* INA § 245(m)(1)(A) ("the [noncitizen] has been physically present in the United States for a continuous period of at least 3 years since the date of admission as a nonimmigrant under [the principal or derivative portions of the U visa statute]").

[19] INA § 245(m)(2).

[20] Applicants in this position often must seek expedited processing from both USCIS and the consulate, and elicit assistance from third parties, such as a Congressional liaison, to achieve everything before 90 days go by. For information on this, recipients of OVW LAV, STOP, and ELSI funding and ASISTA members may request technical assistance (TA) from ASISTA. *See also* ASISTA, *Requesting Congressional Liaison Assistance* (Sep. 30, 2020), available at https://asistahelp.org/wp-content/uploads/2020/10/Congressional-liaison.pdf.

[21] *See Matter of M-D-C-F-B-*, at 3 (AAO Jan. 9, 2018) (unpublished) ("However, the Act does allow an applicant to accrue continuous physical presence beginning from any admission in U status, including admissions made after departures that broke a prior period of continuous presence."), *Matter of C-E-A-V-* (AAO May 22, 2017) (unpublished).

The third (potential) mechanism is advance parole. **ASISTA cautions practitioners that USCIS has not published formal guidance about how U Nonimmigrants might apply for advance parole, except as related to a pending application for adjustment of status.** When ASISTA asked at the September 2023 engagement whether travel on advance parole is possible in other circumstances, USCIS did not respond.[22] Instead, USCIS stated the following: "In general, what we are able to say on travel is that practitioners need to look at the Preamble to the 2007 regulations for all travel questions. Consular processing is specified there. USCIS is considering options for the future but the Preamble is all that's there right now."[23] Advance parole is not mentioned in the Preamble,[24] so USCIS's statement seems designed to discourage widespread use of advance parole applications by U Nonimmigrants. **That said, Form I-131 and its instructions state that U Nonimmigrants are eligible for advance parole**.[25] ASISTA members have reported obtaining advance parole for U Nonimmigrants at USCIS field offices including San Francisco, Seattle, Nashville, and New York City. ASISTA encourages practitioners to consult local colleagues about practices at their local field offices. Even if a U Nonimmigrant is approved for advance parole, the practitioner and U Nonimmigrant must be mindful of the consequences of travel on advance parole that are mentioned in Sections I(iii) and ensure no break in CPP. **ASISTA urges all considering this mechanism for travel to very carefully evaluate current policies and enforcement practices first**.

i. Caution When Traveling Abroad with a Pending Form I-539

U Nonimmigrants with pending Form I-539s should understand that USCIS policy makes it risky to travel abroad if the form is close to adjudication. At the September 2023 engagement, USCIS stated that the noncitizen must be in the United States when Form I-539 is filed *and* adjudicated.[26] USCIS did not provide a citation for this assertion, potentially leaving it subject to challenge. However, as a practical matter practitioners should understand that I-539 applications may be deemed improvidently granted if they are approved while the U Nonimmigrant is outside the United States. To avoid a potentially drawn-out dispute with USCIS, it is best practice for practitioners to advise U Nonimmigrants against international travel if the processing times suggest that their Form I-539 may be approved while they are outside the country. If there is an urgent need to travel, the practitioner may consider requesting expedited processing of the Form I-539 under the "emergencies or humanitarian situations" category.[27]

[22] *USCIS Q & A*, *supra* note 6, at 3-4.
[23] *Id*. at 3.
[24] *See generally* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014 (Sept. 17, 2007).
[25] *See* Form I-131 Instructions, *supra* note 5, at 7. Note there is no citation for the Instructions' statement.
[26] *USCIS Q & A*, *supra* note 6, at 5.
[27] For more information on expedite requests, see 1 USCIS-PM A.5.

III. International Travel with a Pending Application for U-Based Adjustment

U Nonimmigrants with pending U-based adjustment applications are eligible for advance parole, but must be cautioned about certain risks of international travel.[28]

i. Preserving the Three Years of Continuous Physical Presence Required for U-Based Adjustment

For purposes of calculating the three years of CPP required for adjustment, USCIS has confirmed that the initial date of U admission is generally considered controlling, even for those who travel and return on advance parole.[29] Thus, for purposes of adjustment eligibility, it is irrelevant whether the noncitizen's I-94 after return on advance parole states they entered as a parolee, rather than a U Nonimmigrant. It is also generally irrelevant if their new advance parole I-94 states their entry date as fewer than three years prior to the date of the adjustment application's adjudication.[30]

However, as stated earlier, noncitizens traveling on advance parole must be mindful not to break CPP. If they break CPP, USCIS has stated that the I-94 entry date upon return from advance parole will be used to calculate CPP.[31] The best practice is for noncitizens traveling on advance parole to book short trips that end well before the end of the applicable 90 or 180 day time period. As stated earlier, these noncitizens must also be mindful of the general consequences of traveling on advance parole that are listed in Section I(iii) of this Practice Advisory. In particular, the noncitizen should file a motion to reopen and terminate any prior removal proceedings, and ensure the motion is approved, *before* traveling on advance parole.[32]

ii. Abandonment of LPR Application for Travel Without Advance Parole

Practitioners should advise U Nonimmigrants with pending adjustment of status applications that departure from the U.S. without approved advance parole will result in abandonment of their adjustment application, even if the travel is short and/or on a multi-entry visa.[33] In addition, as noted previously, even with advance parole, a U adjustment applicant abandons the adjustment application if they depart the U.S. while

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[28] *See, e.g.,* 8 CFR § 245.24(j) (U adjustment applicant who departs with pending adjustment application is "deemed to have abandoned" the application, unless they are granted advance parole and are subsequently inspected and paroled upon return to the United States).
[29] *USCIS Q & A*, *supra* note 6, at 4.
[30] *See USCIS Q & A*, *supra* note 6, at 4
[31] *Id*. at 4-5.
[32] *See also* 8 CFR § 245.24(j).
[33] *Id. See also* 8 CFR § 1245.2(a)(4)(ii)(A). The only exceptions are for the rare applicants who hold not just U Nonimmigrant status, but also certain L, H, K, or V statuses, and who travel on visas based on such other status. *Id.* at § 1245.2(a)(4)(ii)(C) & (D). However, it is not clear if USCIS intentionally permits U recipients to simultaneously hold these additional statuses. Moreover, should such an applicant return on one of those visas, it is not clear that USCIS would still deem them to be in U status (as opposed to exclusively in L, H, K, or V status, in accordance with their reentry I-94), which is required for U-based adjustment to be approved. Thus, advance parole remains the safest travel option for the aspiring LPR.

in removal proceedings (including while subject to an unexecuted order).[34] Should a U Nonimmigrant successfully return from a trip abroad without advance parole, they will only be able to pursue adjustment if (1) they did not break CPP, (2) they continue to hold U status, and (3) they submit a new Form I-485 adjustment application.

This second requirement (maintenance of U status) should not be overlooked. Because current processing times for U-based adjustment are lengthy, many U Nonimmigrants' original U statuses will expire while they are waiting for their LPR applications to be approved. This is not a problem for the LPR applicant whose I-485 is timely submitted and never abandoned through non-advance parole travel, because the timely I-485 automatically extends the U status while the I-485 pends.[35] However, if the timely I-485 is abandoned and no longer pending, the former U Nonimmigrant will no longer be in valid U status. They will have to seek restoration of their U status through a *nunc-pro-tunc* extension of status application on Form I-539.[36] Such *nunc-pro-tunc* extension is highly discretionary and requires proving exceptional circumstances. Only if it is a granted will the survivor again become eligible for U-based adjustment of status – and the period the extension pends is currently over one year, during which work authorization may not be available.[37]

iii. Reminder about Survivors in Proceedings

As noted above, USCIS cannot grant advance parole to noncitizens in removal proceedings (including noncitizens with unexecuted removal orders).[38] **Thus, noncitizens seeking to travel on advance parole must have their removal proceedings terminated.** If USCIS improvidently grants advance parole to a U *adjustment* applicant in removal proceedings or with an unexecuted order, the applicant will be deemed to have abandoned their U adjustment application at the moment of departure from the United States, even if they depart with the improper advance parole document.[39] To avoid abandoning their adjustment applications, U adjustment applicants must have their removal proceedings terminated *before* they apply for advance parole with USCIS. It is best practice to verify whether a U adjustment applicant has an unexecuted order of removal before seeking advance parole. If a U adjustment applicant has already traveled on improvidently granted advance parole, the practitioner should follow the steps in Section III(ii), *supra*.

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[34] *See* 8 CFR § 245.24(j).

[35] INA § 214(p)(6) ("[U Nonimmigrant status] shall be extended during the pendency of an application for adjustment of status under section 1255(m) of this title.").

[36] For more on *nunc-pro-tunc* requests to extend U status, *see* ASISTA, *Correctly Identifying the Expiration Date of U Nonimmigrant Status* (Feb. 8, 2024), at page 4, available at https://asistahelp.org/wp-content/uploads/2024/02/2024-I-797-and-I-94-Update.pdf.

[37] To seek work authorization while a *nunc pro tunc* extension request is pending, the noncitizen would also need to have a Form I-485 pending so they could request a work permit in category (c)(9). It is sometimes permissible to file the I-485 concurrently with the *nunc pro tunc* I-539 for this purpose, but only if the applicant is actually eligible for Form I-485 (meaning, among other things, they must have accrued an unbroken period of three years of CPP prior to the new I-485 being filed).

[38] Form I-131 Instructions, *supra* note 5, at 10.

[39] *See* 8 CFR § 245.24(j) ("abandonment upon departure" clause for U adjustment applicants in removal proceedings has no exception for applicants who depart with advance parole).

IV. International Travel in U-Based LPR Status

The ability to travel abroad and return is one of the most important features of LPR status. However, practitioners and U-based LPRs should be mindful of the nuanced rules surrounding international travel by LPRs.

i. Length of International Travel

International trips by LPRs should be short for three reasons. First, a long absence from the United States may lead USCIS to conclude the noncitizen has abandoned their LPR status.[40] Second, long trips abroad may affect continuous residence[41] and physical presence[42] for naturalization purposes. Third, LPRs who spend more than 180 continuous days outside the U.S. are deemed to be "seeking admission" upon return.[43]

Regarding abandonment of LPR status, the rule of thumb is that a trip lasting one year or more leads to a presumption of abandonment.[44] USCIS has stated that a longer absence caused by "unforeseen circumstances" will still be considered a temporary trip abroad (not to be deemed an abandonment of residency) "so long as the LPR continued to intend to return as soon as his or her original purpose of the visit was completed."[45] The U-based LPR should plan for trips of substantially less than a year and be prepared to demonstrate that any longer absence was truly "unforeseen." For example, they could present a return ticket for a date that was earlier than their actual date of return to the United States, and evidence of what caused the need to stay longer and when that need arose.

The naturalization requirements of continuous residence and physical presence will be most important to the U-based LPR who wishes to become a citizen as soon as possible. Such survivors should plan only short trips of less than six months at a time, and should ensure they spend more than half of their days in the U.S.[46]

When it is impossible for the U-based LPR to take only a short trip abroad, they should strongly consider seeking a Reentry Permit to facilitate their return.[47] They should also

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[40] 12 USCIS-PM D.2(B)(1) ("While an extended absence from the United States alone is not conclusive evidence of abandonment of LPR status, the length of an extended absence is an important factor.").
[41] *See* INA § 316(b) (absence of more than six months but less than one year during continuous residency period presumed to break continuous residence, unless the noncitizen proves they did not abandon their U.S. residence; absence of one year or more breaks continuous residence, with certain exceptions).
[42] *See* INA § 316(a) (requiring naturalization applicants to be physically present in the United States for at least half of the five-year period immediately preceding the naturalization application).
[43] INA § 101(a)(13)(C)(ii).
[44] *See* 8 CFR § 211.1(a)(2).
[45] *See* 12 USCIS-PM D.2(B)(1).
[46] INA § 316(a) & (b).
[47] *See, e.g.,* USCIS, *I am a Permanent resident: How do I get a reentry permit?*, available at https://www.uscis.gov/sites/default/files/document/guides/B5en.pdf.

be prepared to demonstrate their continued intent to "reside permanently" in the U.S..[48] USCIS suggests that "continued ties" to the U.S. can demonstrate such an intent.[49] These include filing U.S. income taxes as a U.S. resident, maintaining employment and property in the United States, "maintaining a driver's license" with a U.S. address, and children attending school in the United States.[50] At the time of U-based LPR approval, practitioners should advise survivors and qualifying family members of the importance of keeping international trips short and maintaining ties to the United States.

ii. Other Reasons an LPR May Be "Seeking Admission" Upon Return, and Why this Matters

Separately, when a U nonimmigrant is granted LPR status, practitioners should advise them of the circumstances when they will be deemed to be "seeking admission" upon return from a trip abroad, as well as the consequences of such a designation. As noted above, one circumstance when an LPR will be "seeking admission" on return is if the trip was for longer than 180 days. Others include if the LPR has committed a crime covered by INA § 212(a)(2), or if the LPR departs while a removal order is outstanding or proceedings are ongoing, as discussed below. There are also other circumstances not discussed in this advisory, which appear at INA § 101(a)(13)(C).

If the circumstance cannot be remedied (by, e.g., keeping the trip short, obtaining post-conviction relief or obtaining an order terminating removal proceedings), it is a best practice to advise against all international travel until naturalization. This is because LPRs who are "seeking admission" are subject to the grounds of inadmissibility, at INA § 212, instead of grounds of deportability, at INA § 237. They can be placed in removal proceedings for conduct that would not make them removable if they were not seeking admission. Were this to happen, some U-based LPRs may be eligible for relief in removal proceedings, but not all would be. Further, LPRs seeking admission are more likely to receive removal orders than other LPRs because LPRs seeking admission are charged with grounds of inadmissibility, meaning that they have the burden of proof.[51]

A. Criminal grounds

One of the circumstances when an LPR is deemed to be "seeking admission" is when they have "committed an offense identified in" INA § 212(a)(2), unless after the offense, the LPR "has been granted relief under" INA § 212(h) (immigrant waiver for certain criminal grounds of inadmissibility) or INA § 240A(a) (LPR cancellation of removal).[52]

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[48] *See* 12 USCIS-PM D.2(B)(1) ("The key factor in determining if an applicant abandoned his or her LPR status is the applicant's intent to reside permanently in the United States.").
[49] *See id*.
[50] *See id*.
[51] *Compare* INA § 240(c)(2)(A) (applicants for admission have the burden to establish that they are "clearly and beyond doubt entitled to be admitted and [are] not inadmissible") *with* INA 240(c)(3)(A) (for admitted noncitizens, the government must establish the noncitizen's deportability "by clear and convincing evidence").
[52] *See* INA § 101(a)(13)(C)(v).

U-based LPRs who have “committed an offense identified in” INA 212(a)(2) *after* becoming LPRs will be deemed to be “seeking admission” upon return to the United States. Note that the crimes identified in the “seeking admission” clause encompass a much broader class of crimes than appear in INA § 237(a)(2), which identifies the criminal grounds of deportation and is typically used to assess the immigration consequences of an LPR’s conviction. For this reason, defense counsel may correctly tell a criminalized LPR that a plea will not render them deportable under INA § 237(a)(2), but the LPR should not be lulled into a sense of security that the crime would be immigration-neutral if they traveled and were deemed to be seeking admission. For example, a single conviction for a crime involving moral turpitude more than five years after admission, or a single offense involving possession for one’s own use of 30 grams or less of marijuana, places the LPR in the “seeking admission” category, even though such an offense would not make the LPR deportable.[53]

Thus, at case closing practitioners should advise all U-based LPRs to seek legal counsel *before* leaving the United States if they are convicted of *any* crime after becoming an LPR. Post-conviction relief (“PCR”) may be a possibility for LPRs with such offenses. The PCR process should be completed *before* travel, and the LPR should carry a copy of the PCR order when attempting to reenter the United States. To be effective for immigration purposes, the PCR must satisfy the standard in *Matter of Pickering*, 23 I&N Dec. 621, 624 (BIA 2003), meaning it must be based on a substantive or procedural defect in the underlying criminal proceedings.

Thankfully, by the plain statutory language of INA § 101(a)(13)(C)(v),[54] it appears only noncitizens who were already LPRs when they triggered their criminal inadmissibility ground should properly be deemed to be “seeking admission.” Those whose criminal history predates their LPR admission should arguably not be deemed to be “seeking admission.” That said, it may still be safest and best practice to advise against travel for these folks until they either obtain qualifying PCR or naturalize. It only takes one exceptionally zealous CBP or ICE official to initiate removal proceedings, whether they ultimately lead to removal or not.

B. Removal grounds

U-based LPRs who have “departed the United States while under legal process” seeking their removal will also be deemed “seeking admission” upon return.[55] This includes LPRs who depart the U.S. while in active removal proceedings, as well as LPRs who depart with unexecuted removal orders. The statute is phrased broadly, and thus appears to encompass such departures even if the removal order was issued

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[53] *Compare* INA 212(a)(2) *with* INA 237(a)(2).
[54] *See* INA § 101(a)(13)(C)). The opening clause states the provisions apply to noncitizens already “lawfully admitted for permanent residence.” *Id.* In addition, the crime-specific clause has an exception for LPRs who “have been granted relief under section 212(h) … or 240A(a).” *Id.* at § 101(a)(13)(C)(v). These are forms of relief only available to LPRs, suggesting Congress intended this section to apply only to those who committed the offenses as LPRs. ASISTA thanks Alison Kamhi of the Immigrant Legal Resource Center for sharing her interpretation of this statute.
[55] *See* INA 101(a)(13)(C)(iv).

before the noncitizen became an LPR. That said, based on context clues in the plain language of the rest of INA § 101(a)(13),[56] it seems only to apply to *departures* occurring *after* becoming an LPR. To avoid coming within this clause, the LPR should file motions to reopen and terminate removal proceedings,[57] and receive an order terminating proceedings, *before* leaving the United States. The LPR should carry the order when they return to the United States. Practitioners representing U-based LPRs in this posture should consider writing letters highlighting the termination of proceedings, which the clients can present to Customs and Border Protection ("CBP") if necessary. They should also be prepared to advocate for their clients with CBP if there is a dispute.

V. <u>Conclusion</u>

As processing times increase, international travel is becoming an increasingly salient topic for applicants and holders of U Nonimmigrant Status. Practitioners should be mindful of the considerations and nuances surrounding travel at different stages of the U Nonimmigrant process, and should advise survivors and their qualifying family members accordingly.

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[56] *See* note 53, *supra*. ASISTA thanks Alison Kamhi of the Immigrant Legal Resource Center for her interpretation of this statute.

[57] Individuals granted U status and/or LPR status since their removal orders were issued generally have strong grounds for these motions. *See* 8 CFR § 214.14(c)(5)(i) & (f)(2)(i); 8 CFR §§ 1003.1(m)(1)(i), 1003.18(d)(1)(i). *See also* ASISTA, *New DOJ Rule: Administrative Closure and Termination in Removal Proceedings For Immigrants Seeking Survivor-Based Relief* (Aug. 19, 2024).

Appendix A:

International Travel at Different Stages of the U Nonimmigrant Process

	Travel Options (Subject to Cautions Described Above!)
In Removal/ Unexecuted Removal Order	• Advance parole not available through USCIS • Travel will generally constitute/execute removal order • Travel will likely create new inadmissibility grounds • Travel will likely cause LPR to be deemed "seeking admission"
U Visa Pending, *and* Not Yet Waitlisted	• No U-based options formally available • Rumors of BFD-based advance parole from certain field offices • Humanitarian parole may be attempted after departure • Travel with non-U-based advance parole or valid visa does not disrupt BFD-based deferred action
U Visa Pending, *and* Placed on Waitlist	• Parole mandated by regulation but not routinely granted • Courts have sometimes required *parole* for applicants *abroad* • Courts have *not* required *advance* parole if deferred action granted • Humanitarian parole may be attempted after departure • Travel with non-U-based advance parole or valid visa does not disrupt BFD-based deferred action
U Visa Granted *and* No Adjustment Application Yet	• Some U nonimmigrants receive multi-entry U *visas* in passport • U *visa* possibly available at consulate post-departure, but slow and new I-192 may be required if new inadmissibilities triggered • Scattered U-based advance parole from certain field offices • Beware of travel disrupting continuous physical presence for AOS • If extending status, must be in US when I-539 filed and decided
U Visa Granted *and* Adjustment Pending	• I-485-based advance parole (AP) available unless in removal • AP required to prevent abandonment of adjustment application • Beware of travel disrupting continuous physical presence for AOS
U Adjustment Granted	• Travel with LPR card • Beware of travel if client would be deemed "seeking admission" • Beware of travel disrupting naturalization requirements or causing abandonment of LPR status

Appendix B:

Broadly-Applicable Client Warnings About Advance Parole Travel[58]

- Advance parole is discretionary for USCIS to grant. If denied, potential for NTA, depending on survivor's equities and applicable NTA memo.
- Advance parole is discretionary for CBP to honor. Though not common in recent years (barring discovery of material changes or previously-undisclosed negative facts), CBP can deny entry for discretion or issue NTA to inadmissible survivors.
- Departure, even with advance parole, may be treated as creating new inadmissibility. As of publication, USCIS follows *Matter of Arrabally and Yerrabally*, 25 I&N Dec. 771, and does not regard advance parole travel as triggering three- or ten-year unlawful presence bars under INA § 212(a)(9)(B). However, DOS (consulates) interpretation is different. Further, USCIS may regard advance parole travel as executing a removal order or otherwise triggering INA § 212(a)(6)(B) (departure after failing to attend removal proceedings without reasonable cause) or INA § 212(a)(9)(A) (departure after removal order).
- While outside country, survivors may be unable to comply with reasonable requests for LEA assistance, frustrating U or U-adjustment eligibility.
- While outside country, survivors may miss important case correspondence from USCIS or attorney, such as RFE, NOID, or decision requiring action. This can result in denials, denials for abandonment, or loss of post-decision opportunities.
- While outside country, survivors who do learn of USCIS correspondence may still be unable to comply due to inability to return and provide biometrics in time or to obtain certain requested documents from abroad.
- **While outside country, relevant U.S. law or policy may change, affecting survivor's ability to re-enter, or affecting legal consequences of using advance parole.**
- Re-entry as "parolee," rather than as a U visa holder, *prior* to filing I-485, may prevent USCIS from finding U recipient was in valid U status at time of filing I-485, as required under INA § 245(m). This is possible, although ASISTA is aware of various survivors having success with adjustment even after such travel.
- Civil strife, pandemic, falling ill or other unforeseen difficulties could frustrate return within window during which AP document permits travel.

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[58] This Appendix pertains to U applicants and recipients only. Its content may apply similarly in other contexts, but practitioners should do their own research to verify where differences may exist. *See generally USCIS PM.* Further, as described throughout the advisory, additional warnings may be prudent for U applicants and recipients, depending on the survivor's case posture and other facts.