

Advanced Issues In T and U Visas

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This advisory covers a number of advanced topics related to U and T visas in a brief space. It does not provide basic information on either crime-victim visa but reviews, for both U and T visas: strategies for working with law enforcement to gain certifications; derivative issues; consular processing and travel problems; and challenges at adjustment.

Working with Law Enforcement

The U visa requires certification by law enforcement, INA §214(p)(1), 8 CFR §214.14(c)(2)(i). The T visa prefers, but does not require it, INA §214(o)(6), 8 CFR §214.11(f). Developing effective strategies for working with law enforcement is, therefore, crucial to success in representing victims of crimes seeking these forms of status.

Practice Pointers for Both

Law enforcement personnel are not generally familiar with immigration attorneys and may not trust them. A fundamental principal of working with them (or any new ally) is to find a “trusted messenger” who can help you build a relationship with them and to encourage them to use the tools Congress created for them to work effectively with noncitizen victims of crimes: the U and T visas. Here are some practice pointers:

- Work with victim advocates, either embedded in the criminal system or at service provider organizations, such as domestic violence shelters or rape crisis centers.
- Explore other possible allies who may have influence and relationships of trust with law enforcement, such as faith-based and community-based organizations or local or state government officials.
- Do not wait for a crisis (real case) to reach out and meet with them; use hypotheticals to explore where they are likely to be sympathetic and where they may need more “education.”
- Check with those in your area already working with immigrant U and T applicants; they probably already have done the things above!

For T Visas

One advantage of working with federal law enforcement is they can help victims get “continued presence” quickly, which provides immediate access to all social services (the equivalent of refugee benefits), 28 CFR §1100.35(b). This is not a secure immigration status, however, so even trafficking victims who can get it should seek T visas, either with law enforcement support or without. INA §214(o)(7), 8 CFR §214.11(h)(2). Remember that local law enforcement can also certify T visas, even though the form is still designed only for federal authorities. 8 CFR §214.11(a). If you cannot get a law enforcement certification, show how you tried to get certification by keeping and sharing with United States Citizenship and Immigration Services (USCIS) phone, mail and email records of contact with ICE or other federal agencies. 8 CFR §214.11(h)(2).

For U Visas

The Department of Homeland Security (DHS) has issued a very helpful guide for law enforcement on their role in certifying U visas. *U Visa Law Enforcement Certification Guide for Federal State, Local, Tribal and Territorial Law Enforcement* (Dec. 2011) (hereinafter “*Guide*”), available at www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf

Use this guide as a tool; it meets the criteria noted above, coming from a trusted source. Its “Frequently Asked Question” section may be particularly helpful, answering questions about whether law enforcement can certify old cases (yes), whether they are granting status by doing so (no), whether the crime they charge must be the same as the crime they certify (no); and whether they should be concerned about the applicant’s “substantial harm” or criminal and immigration history (no). *Guide* at 8 - 15. USCIS also has set up several other routes for law enforcement to contact them with questions, including webex presentations just for law enforcement and a direct telephone and email line to USCIS’ VAWA/U/T unit at the Vermont Service Center. *Guide* at 17.

*U Helpfulness Practice Pointers*¹

- Work with your client and a victim advocate to explain why law enforcement wants the helpfulness it is requesting; in turn, the victim advocate may be able to convince law enforcement that the helpfulness they are seeking is too dangerous for your client.
- Start with the law enforcement agencies that are likely to have the broadest definition of helpfulness, *e.g.*, police need people to talk to them; district attorneys need credible testimony.
- Do not assume the information your client has is not enough; law enforcement may have an open file on the perpetrator, especially for crimes such as sexual assault where perpetrators generally prey over time on a vulnerable population, *e.g.*, undocumented women.
- If the facts do not obviously fit in one of the U “categories” of crimes, present the facts to allies in the criminal system and ask them whether there are crimes they investigate that fit one of the categories.

Derivatives

The same general classes of family members qualify as derivatives for both U and T visas: If the principal is under 21, he or she may include spouse, children, parents, and siblings under 18 at time of principal filing; if the principal is over 21, he or she may include the spouse and children. INA §§101(a)(15)(U)(ii) & (T)(ii). Adult T principals may also include parents and siblings under 18 at date of principal filing if those family members face a “present danger of retaliation” for the principal’s escape from trafficking or helpfulness to law enforcement. INA §101(a)(15)(T)(ii)(III).

Because of statutory differences between T and U visas at section 214, USCIS at the time of this writing is holding the cases of U derivatives who age out after filing or after approval.ⁱⁱ Guidance addressing this problem is expected soon. Readers with affected cases should check with the AILA VAWA subcommittee or the ASISTA website (asistahelp.org) for updates. For T visas, USCIS measures age of both principal and derivative at time of principal filing. INA §214(o)(4) & (5).

*Practice Pointers on U Derivative Age-outs*ⁱⁱⁱ

- All U derivatives whose cases are on hold should file requests for extension of status on Form I-539, noting that they are awaiting USCIS guidance on age-outs. INA §214(p)(6).^{iv}
- **Principal U recipients whose derivatives are stuck abroad due to the age-out problem MUST file extensions of status for themselves.^v Do not adjust these principals!** Derivatives abroad have no status to extend, so they cannot file I-539s, and principals who adjust before their children enter the United States *have rendered the children ineligible for U status*. 8 CFR §214.14(g). If those children also have aged out, they are no longer eligible to adjust along with the principal, *see* INA §245(m)(3), and the only route to status will be a regular family-based petition filed by the now lawful permanent resident parent.
- Consider filing Deferred Action for Childhood Arrival (DACA) applications if they are otherwise eligible.^{vi}

Consular Processing & Travel

Processing abroad is generally the same for T and U visas, as is the law on absences affecting adjustment (no more than 90 days or 180 days aggregate). INA §§ 245(1)(3) & (m)(2). For both, therefore, it's important to warn your clients before they travel of the consequences for adjustment of stays abroad. There are some differences, however.

For T visas:

- Unlike U visa applicants, T visa applicants may not travel and process their visas abroad. *Visas for Victims of Human Trafficking*, http://travel.state.gov/visa/temp/types/types_5186.html
- Approved T visa holders must obtain advance parole before travelling (*Questions and Answers: Filing T, U, and VAWA Petitions with USCIS*, <http://www.uscis.gov>)

- Those eligible for adjustment may request advance parole but must have three years of continuous physical presence. INA §245(l)(1)(A).
- Expect consulates to investigate whether derivatives were involved in the trafficking.

For U visas consular processing is relatively new, so many of the kinks are still being worked out. To access a helpful interactive Google document on consular practices regarding U visas, contact Jessica Farb of the Immigrant Center for Women and Children at jessicafarbuvisa@gmail.com. USCIS officers have also helped “explain” U visas to local consulates and DOS has proven more willing to intervene in cases.^{vii}

It is particularly important to avoid or prepare for inadmissibility problems at the consulate:

- USCIS’ Vermont Service Center (VSC) adjudicates all U inadmissibility, though consulates may identify issues VSC was unaware of, delaying processing while VSC adjudicates the new grounds. This is why it is important to explicitly list the inadmissibility grounds you want waived; the grounds should appear in the file the consulate sees when your client attempts to process.
- U principals often trigger unlawful presence, INA §212(a)(9)(B), when they travel, usually to help their derivatives process (see below). To prepare for this, get their signature on a new I-192 form before they leave and send the new form to VSC as soon as your client triggers unlawful presence by leaving. Contact the U hotline^{viii} once you know VSC has received the waiver request to ask for swift review so your client avoids accruing time that vitiates continued presence for adjustment.

Adjustment

Requirements are similar but not exactly the same for T and U visa holders. *Compare* 8 CFR §245.23 (T adjustment) *with* 8 CFR §245.24 (U adjustment). The most significant issues for each appear below.

For T Visas:

- T visa holders may adjust as soon as their cases are closed. INA §245(l)(1)(A), 8 CFR §245.23(a)(3).
- Continued presence prior to gaining the T visa counts towards the three years otherwise required. INA §245(l)(1)(A), 8 CFR §214.11(p)(1).
- T applicants must show admissibility, good moral character and “extreme hardship involving unusual and severe harm.” INA §245(l)(1), 8 CFR §245.23.

Unless they are Nazis, genocide perpetrators or others described in INA §212(a)(3)(E), U adjustment applicants need not show admissibility but must show three years of continuous presence, that they have not unreasonably refused to help law enforcement, and that their presence is justified on humanitarian grounds, to ensure family unity or is in the public interest. INA §245(m), 8 CFR S 245.24(b).

Since most U recipients have already shown it is in the public interest to grant inadmissibility waivers, the primary barrier is the “ongoing helpfulness” requirement.

Arguably, USCIS should bear the burden of proof for this requirement, *see* INA §245(m)(1), but in practice the regulations make it easy for applicants to meet this requirement, even if they cannot get a second certification from law enforcement. 8 CFR §245.24(a)(5) & (e)(2)(allowing affidavits and other evidence).

Waiting to file for derivatives until the adjustment phase, however, poses several problems, INA §245(m)(3):

- They must be “children” when the principal files for them (on Form I-929) and cannot file until after principal has adjusted, 8 CFR §245.24(g)(2) & (4);
- They must show extreme hardship to themselves or to the principal, 8 CFR §245.24(g)(3) & (h)(1)(iv); and
- Because there is no admissibility requirement, any issues that raise admissibility concerns will likely be major negative discretionary factors, 8 CFR §245.24(h)(v).

If an approved U derivative abroad has not been able to process into the United States, however, this may be a good option. They can probably show extreme hardship and positive equities for discretion, having shown it was in the public interest for USCIS to waive any inadmissibility they presented.

Endnotes

ⁱ For more resources on how to work with law enforcement, check the U visa subsection of ASISTA's website "Clearinghouse" at www.asistahelp.org.

ⁱⁱ *See* Levin & Parras, *VSC Teleconference Notes and Practice Pointers Fall 2012* at 9-10, *available at*

http://www.asistahelp.org/documents/news/VSC_Teleconference_Notes_and_Practi_EE_F1F08E02507.pdf.

ⁱⁱⁱ *See* Parras, *U Derivatives Chart*, *available at*

http://www.asistahelp.org/documents/resources/DERIVATIVES_CHART_4499EBC3B4DA8.pdf.

^{iv} *See also* USCIS, *Extension of U Nonimmigrant Status for Derivative Family Members Using the Application to Extend/Change Nonimmigrant Status (Form I-539); Revisions to Adjudicator's Field Manual (AFM), New Chapter 39.1 (g)(2)(i)(AFM Update AD10-08)* (June 22, 2010), *available at*

<http://www.uscis.gov/USCIS/Laws/Memoranda/2010/June/u-visa-i-539-derivative-extension.pdf>

^v *See* USCIS, *Extension of Status for T and U Nonimmigrants; Revisions to Adjudicator's Field Manual (AFM) Chapter 39.1(g)(3) and Chapter 39.2(g)(3) (AFM Update AD11-2)* (Apr. 11, 2011), *available at*

<http://www.uscis.gov/USCIS/Laws/Memoranda/2011/April/exten.status-tandu-nonimmigrants.pdf>

^{vi} *See* Pendleton, *DACA, VAWA & U Visa Applications: FAQ, DACA Basics and Resource List*, *available at*

http://www.asistahelp.org/documents/filelibrary/ASISTA_on_VAWA__DACA_33FFE12D4464C.pdf For information on DACA generally, *see* *AILA Resources on Deferred Action*, *available at* <http://www.aila.org/content/default.aspx?docid=40291>

vii For updates on how to get such system support, contact the AILA VAWA Committee or Gail Pendleton at gailpendleton@comcast.net

viii hotlinefollowupI918I914.vsc@dhs.gov