

IMMIGRATION RELIEF for Victims of Abuse *and Domestic Violence:*

Practitioners' Guide to Serving Non-Citizens

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PENNSTATE
 The Dickinson
School of Law


CCWRC
CENTRE COUNTY
Women's Resource Center
CIVIL LEGAL REPRESENTATION PROJECT



About the Authors

Launched in 2008, **Penn State Law's Center for Immigrants' Rights** provides students with the opportunity to work on innovative advocacy and policy projects relating to U.S. immigration, primarily through representation of immigration organizations. Over the past three years, students at the Center have produced policy-oriented white papers of national impact, prepared practitioner toolkits on substantive areas of immigration law, and assisted with individual casework for detained immigrants, among other projects. The Center's mission is to represent immigrants' interests through legal excellence, advocacy, education, and collaboration with key stakeholders and the community. The following individuals developed this Handbook: Rebecca Ternes, J.D. student; Elham Sadri, LLM student; Shoba Sivaprasad Wadhia, Clinical Professor of Law and Director of the Center for Immigrants' Rights; and Angela Lombardo, Records Specialist.

The **Centre County Women's Resource Center (CCWRC)** is a non-profit organization located in State College, Pennsylvania, that provides a range of services, including emergency shelter, counseling, advocacy, transitional housing and legal services to victims of domestic violence and sexual assault. CCWRC is a leading voice for victims of domestic and sexual abuse in the Central Pennsylvania region and provides advocacy and education on topics related to domestic and sexual abuse in the community. The Civil Legal Representation Project (CLRP) is the division of the CCWRC that provides legal advice and representation to survivors of domestic violence and sexual assault in family law matters. The CLRP staff understands the dynamics of domestic violence and sexual abuse and how those dynamics affect survivors in the family law system and is committed to working with clients so that they have the information and legal assistance they need to help achieve and maintain independence from their abusers. Justine Andronici, CLRP Director; Sharon Barney, Staff Attorney; and Stephanie Keeler, Paralegal, contributed to the development of this Handbook.

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About this Handbook

This Handbook outlines immigration remedies for non-citizen victims of domestic violence and sexual assault. It is intended to aid attorneys who typically practice family law and have experience working with domestic violence victims. The Handbook hopes to aid such practitioners in expanding their services to those victims who also need legal help with their immigration issues. This Handbook includes information about the following remedies: the **U visa**, **T visa**, **VAWA self-petition**, **VAWA cancellation of removal**, and **prosecutorial discretion**. It contains an analysis of the substantive materials on these subjects, including relevant statutes, regulations, agency memoranda, and secondary sources. This is combined with information provided by experts and practitioners with practice and policy experience in these areas. Such information includes advice provided in the form of interviews, as well as resources, such as articles, checklists, and sample documents.

The substantive material of the Handbook is organized according to remedy. A greater emphasis has been placed on U visas, T visas, and VAWA self-petitions, with VAWA cancellation or removal and prosecutorial discretion receiving a briefer discussion. Important terms have been indicated by boldface type. Advice provided through interviews with the experts and practitioners is included as bold, italicized bullet points, and looks like this:

➤ ***Practice tip: Practitioner advice included here.***

The **Appendices** are divided into four parts.

- **Appendix A** includes checklists of forms, fees, and other documents required for the applications of each remedy, as well as a comparison chart of the remedies.
- **Appendix B** includes public resources, such as government and NGO documents, provided as hyperlinks available for electronic retrieval.
- **Appendix C** includes a table of contents of the resources and samples provided by the previously described stakeholders.
- **Appendix D** includes confidential emails, anecdotes, and interview notes from the stakeholders. The stakeholders who have indicated that they would be willing to serve personally as a resource have been marked with an asterisk. Appendix D is not available to the public.

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Introduction

Domestic violence affects individuals across all races, ethnicities, nationalities, and social strata. It is critical that advocates and attorneys who work with victims of domestic violence and sexual abuse understand and appreciate the dynamics of power and control and how they inform the experiences and safety of their clients.¹ This understanding is especially important in working with non-citizen victims who may experience domestic violence and sexual abuse differently from their American citizen counterparts. Increasingly, advocates and attorneys are noting the unique challenges facing non-citizen victims as they consider leaving an abusive situation. A number of factors contribute to the differing experiences of non-citizen victims. As a result of language and cultural barriers, non-citizen victims may be less informed about their legal options and less aware of available support services in the community. Isolation may occur more easily for immigrant women who have entered an environment where they may not know the language, culture, or physical geographic area, making it easier for their abusers to gain control over them and their resources.² Different cultural beliefs and standards may also prevent some immigrant women from seeking separation or divorce from an abusive husband. Significant cultural barriers may increase challenges for non-citizens seeking to leave an abusive situation. For example, while divorce is common in the United States, other countries expressly prohibit or discourage separation of spouses. These ideologies remain present in immigrant communities in the United States, where women who decide to leave abusive husbands may not receive support from community members and extended family.³

One of the largest barriers facing non-citizen victims is the fear of immigration-related consequences should they report the abuse. Non-citizens may harbor anxieties around interactions with law enforcement agencies, who they view not as resources but as individuals to be avoided. These anxieties may be exacerbated by their abusers, who purposely misinform them of the consequences of reporting abuse and threaten them with immigration problems should they seek help. Abusers may attempt to control non-citizen victims by giving victims false information about legal status and options or by threatening them with deportation if they report the abuse or attempt to leave the abuser. In fact, abusers often use immigration-status-related abuse to attempt to lock their victims in abusive relationships. This situation is compounded if the victim is undocumented or otherwise reliant on the abuser for her immigrant status and if the couple has children. An abuser may control whether or not his partner or spouse obtains legal immigration status in this country, whether any temporary legal immigration status she has may become permanent, and how long it may take her to become a naturalized citizen.⁴ This form of power and control is very effective and makes it extremely difficult for a victim to leave her abuser, obtain a protection order, access domestic violence services, call the police, or participate in the abuser's prosecution.⁵

¹ For a more comprehensive discussion on safety planning issues and the importance of confidentiality in working with immigrant victims, please see the note immediately following this introduction.

² Cecilia Menjivar & Olivia Salcido, *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, 16 GENDER & SOCIETY 898, 904 (2002).

³ *Id.*

⁴ Leslye E. Orloff & Olivia Garcia, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, LEGAL MOMENTUM, available at

<http://iwp.legalmomentum.org/reference/manuals/domestic-violence-family-violence>.

⁵ *Id.*

Studies have shown that non-citizen victims are less likely to seek help than their citizen counterparts. While 53% of domestic violence victims generally report the abuse to police, only 27% of battered immigrants are willing to call the police for help in a domestic violence incident.⁶ The numbers drop dramatically to less than a 20% reporting rate when the victim was undocumented.⁷ The leading reason for not reporting abuse to the police among all non-citizen victims is fear of deportation, although many undocumented immigrants often qualify for immigration status.⁸ The fear of reporting is especially significant considering that many victims face increased abuse following immigration. Many immigrant women report an increase in abusive behavior by their partner after arriving in the U.S., while others state that abuse began with immigration.⁹ This data demonstrates the need for advocates and attorneys to understand the special fears facing non-citizen victims of abuse and develop the knowledge and skills necessary to explain the remedies available to them.

The complex and dynamic nature of immigration law makes representation of non-citizen survivors of domestic violence and sexual abuse all the more challenging, as many domestic violence and sexual abuse advocates and attorneys have little training in this area of the law. While remedies do exist for non-citizen survivors, and federal legislation has been passed to address the specific issues facing these individuals, wading through the complex statutory and regulatory materials can be daunting. It is critical that advocates understand which remedy is most appropriate for each particular victim, and the proper procedure for applying for that remedy. This requires a thorough understanding of each individual client's unique experience and the ability to situate that experience in immigration law.

The purpose of this handbook is to provide an overview of the remedies available to non-citizen victims of sexual or physical abuse and domestic violence. It is intended to help attorneys working with domestic violence victims understand some of the key remedies available to immigrant victims and hopefully to aid them in an effort to expand services to those who also need legal help with their immigration issues. While not intended to be comprehensive, it should provide a basic framework and an important starting place for professionals seeking to help non-citizen survivors of domestic violence and sexual abuse. As more practitioners become aware of

⁶Leslye E. Orloff et al., *Battered Women's Willingness to call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 44, 64 (2003) (citing a 1998 Department of Justice study on general patterns of reporting and recent study on battered immigrant women reporting).

⁷*Id.* at 68.

⁸LeslyeOrloff et al., *Countering Abuser's Attempts to Raise Immigration Status of the Victim in Custody Cases*, LEGAL MOMENTUM (2004), available at www.vaw.umn.edu/documents/breakingbarriers/6.1counteringabuserspdf.pdf (suggesting that victims are often undocumented because their abusers have refused to file immigration papers for them).

⁹Mary Ann Dutton et al., *Characteristics of Help Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 250 (2000) (stating that 48% of Latinas in one study reported their partners' violence against them increased upon immigrating to the United States); Giselle Aguilar Hass et al., *Battered Immigrants and U.S. Citizen Spouses*, LEGAL MOMENTUM (2006), available at <http://www.mcadsv.org/webinars/IR-2007-April/VI/BatteredImmigrantsUSCitizenSpouses.pdf> (citing a survey conducted by Ayuda demonstrating that 31% of battered women reported an increase in the incidences of abuse after immigration into the U.S., while 9% reported abuse began with immigration).

the issues facing non-citizen victims and develop an understanding of the legal remedies, more help will become available to this underserved and vulnerable population.

Note on Confidentiality and Safety Planning in Working with Immigrant Victims

Working with survivors of domestic violence and sexual abuse requires close attention to safety planning and confidentiality, and understanding these issues is critical for practitioners working with non-citizen victims. It is important for practitioners to realize the paramount importance of maintaining confidentiality as well as the importance of explaining to their clients how their confidentiality will be protected. This is necessary not only to protect the client's interests, but also to encourage their full disclosure of the details of their unique situation so that the practitioner can provide appropriate advice and assistance.

Advocates and attorneys should explain to their clients that legal remedies available to non-citizen victims are designed to address confidentiality concerns.¹⁰ These provisions also provide that DHS cannot make an adverse determination regarding the admissibility or deportability of a non-citizen using information furnished solely by an abusive family member or other perpetrator of abuse.¹¹ Further, DHS, DOJ, and DOS cannot disclose any information relating to a non-citizen who has applied for U, T, or VAWA relief.¹² As a rule, USCIS will not even confirm the existence of a victim-based application to anyone but the applicant or the representative.¹³ Any official who violates these confidentiality provisions is subject to disciplinary action, as well as up to \$5,000 in fines.¹⁴ Complaints for violations of confidentiality provisions are made to the Office for Civil Rights and Civil Liberties at DHS.¹⁵

As with all victims of domestic violence and sexual abuse, safety planning is a critical component of legal services. Advocates should work with non-citizen victims to develop a comprehensive and individualized safety plan which addresses their unique needs. This may require modification of normal safety planning by determining the immigration implications of safety planning and planning for other safety issues arising from pursuing immigration status.¹⁶ For example, when safety planning with a non-citizen victim, the retention of documentation relating to the immigration process, as well deciding where to keep that documentation is essential. Because abusers may attempt to hide or destroy important identification or immigration-related documents as an attempt to control the victim, making copies and keeping those copies safe is extremely important.

¹⁰See generally, 8 U.S.C. § 1367; Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA §384 (May 12, 1997); Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 (Jan. 22, 2007).

¹¹8 U.S.C. § 1367(a)(1).

¹²8 U.S.C. § 1367(a)(2); see also 8 C.F.R. § 214.14(e).

¹³ Interview with Lisa Hurlbutt (Mar. 14, 2012).

¹⁴8 U.S.C. § 1367(c).

¹⁵ Complaints should include the victim's contact information, a written description of the specific circumstances, relevant documents, and a summary of any other steps taken to resolve the complaint. See "[Reporting a Violation of the VAWA Confidentiality Provisions.](#)" Complaints should be submitted in writing via e-mail, fax or regular mail to: U.S. Department of Homeland Security, Office for Civil Rights and Civil Liberties, Compliance Branch, 245 Murray Lane, SW, Building 410, Mail Stop #0190, Washington, D.C. 20528; E-mail: crcl@dhs.gov; Fax: (202) 401-4708.

¹⁶ Interview with Gail Pendleton (Feb. 9, 2012).

As part of safety planning, clients should consider placing the following documents in a safe place that she will continue to have access to upon leaving her abuser:

- ✓ Birth certificates (for herself and children)
- ✓ Passport
- ✓ 1-94 entry/departure record
- ✓ Permanent resident card (green card)
- ✓ Social Security Card
- ✓ USCIS issued employment authorization
- ✓ All other immigration related documents, including receipt and other notices
- ✓ Orders of Protection and other court documents such as divorce
- ✓ Social security number of her spouse and the parent of her child(ren)
- ✓ Copy of the most recent pay stub of her spouse and the parent of her child(ren)
- ✓ Copy of tax returns
- ✓ Copies of her spouse's birth certificate, social security card, green card, or naturalization certificate.¹⁷

As with all survivors of domestic violence and sexual abuse, it is important to be sure to use a safe address, phone number, and email address for all communications regarding the client's case. Furthermore, working with non-citizen victims sometimes presents challenging language barriers. While it may be tempting to turn to a relative or community member who knows the victim for interpretation, it is considered best practice to refrain from using these individuals and rather have a qualified interpreter that has been trained in providing interpretation, will keep all communications confidential, and who has no conflicts of interest in working with the victim.¹⁸ Again, maintaining confidentiality is paramount when involving third parties for interpretation purposes.

One of the primary goals in working with this population of clients is to help them gain independence and freedom from the cycle of abuse. Domestic violence and sexual abuse advocates and attorneys should remember that victims, both citizen and non-citizen alike, are the best resources for knowing what is going to keep them safe. It is important to involve them in all decision making and to respect their choices, regardless of whether the advocate would make that choice for him or herself.

Disclaimer: This Handbook is a brief discussion of the listed remedies, and does not purport to cover all aspects of immigration law that may be applicable to victims of domestic violence and sexual assault. Legal professionals should not rely upon this as an exclusive source for obtaining information related to the remedies covered in this Handbook. This Handbook is NOT a substitute for legal advice or representation.

¹⁷NATIONAL IMMIGRANT JUSTICE CENTER, PRO BONO ATTORNEY MANUAL ON LEGAL IMMIGRATION PROTECTIONS FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, 19 (2011).

¹⁸ Interview with Christie Popp (Feb. 24, 2012); Interview with Chic Dabby-Chinoy (Mar. 20, 2012); Interview with Sameera Hafiz (Mar. 14, 2012).

U Visa

Description

The **U Visa** is a nonimmigrant visa that was created by the **Victims of Trafficking and Violence Prevention Act** to protect victims of certain serious crimes, including domestic violence and sexual assault. Ten thousand visas are available each year. The U visa allows certain non-citizen crime victims to live and work in United States for up to four years. The U visa also provides an opportunity for the applicant to apply for permanent residency after three years in U nonimmigrant status. The victim does not need to be related to the perpetrator of the crime, and the perpetrator does not need to have lawful immigration status. A victim applies for the U visa by filing **Form I-918** with the USCIS Vermont Service Center. An applicant who is granted U nonimmigrant status is eligible for employment authorization, and may apply for derivative family members.

Eligibility Requirements

A victim must meet the following requirements to be eligible for a U visa:

1. The non-citizen suffered **substantial physical or mental abuse** as a result of having been a **victim of certain criminal activity**;
2. The non-citizen (or in the case of a non-citizen child under the age of 16, the parent, guardian or next friend of the child) **possesses information** concerning that criminal activity;
3. The non-citizen (or in the case of a non-citizen child under the age of 16, the parent, guardian or next friend of the child) **has been helpful, is being helpful, or is likely to be helpful** in the investigation or prosecution of the criminal activity; and
4. The criminal activity **violated the laws of the United States** or occurred in the United States.¹⁹

The applicant must be also be admissible to the United States as a nonimmigrant, and be in possession of a valid, unexpired passport.²⁰

Victim of an Enumerated Criminal Activity

Qualifying certain criminal activity is defined as one of the listed crimes below, or substantially similar activity.²¹

Crimes Covered:

Rape	Kidnapping
Torture	Abduction
Trafficking	Unlawful criminal restraint
Incest	False imprisonment
Domestic violence	Blackmail
Sexual assault	Extortion
Abusive sexual contact	Manslaughter

¹⁹INA § 101(a)(15)(U); 8 C.F.R. 214.14(b).

²⁰8 C.F.R. § 214.1(a)(3); See INA § 212 for grounds of inadmissibility.

²¹INA § 101(a)(15)(U)(i)(IV); 8 C.F.R. § 214.14(b)(4).

Prostitution
Sexual exploitation
Female genital mutilation
Being held hostage
Peonage
Involuntary servitude

Murder
Felonious assault
Witness tampering
Obstruction of justice
Perjury
Slave trade²²

The term “**any similar activity**” refers to criminal offenses in which the nature and elements of the crimes are substantially alike to the statutorily enumerated list of criminal activities.²³ The crime also must have occurred in the territory of United States or violate a U.S. law.²⁴

Direct or Indirect Victims

Both direct and indirect victims of a qualifying crime can apply for a U visa.²⁵ A **direct victim** is a person who suffered direct or proximate harm as a result of the crime.²⁶

Indirect victims are defined by the following situations:

1. The non-citizen spouse, children under 21 years of age and, if the direct victim is under 21 years of age, parents and unmarried siblings under 18 years of age, where the direct victim is dead because of murder or manslaughter, or is incompetent or incapacitated, and so unable to supply information for criminal activity or be helpful in the investigation or prosecution of the criminal activity.²⁷
2. A victim of witness tampering, obstruction of justice, or perjury, if the offender committed the offense to (1) escape or frustrate efforts to investigate, arrest, prosecute, or otherwise bring to justice the perpetrator for other criminal activity committed against the direct or indirect victim, or (2) to further the perpetrator’s abuse, exploitation of, or undue control over the U visa applicant through operation of the legal system.²⁸

The person guilty of the qualifying crime that is being investigated or prosecuted is excluded from being a victim of any qualifying activity.²⁹

Substantial Physical or Mental Abuse

The applicant must prove that he or she suffered **substantial physical or mental abuse** due to being a victim of the qualifying crime.³⁰ **Physical or mental abuse** is injury or harm to the

²²8 C.F.R. § 214.14(a)(9).

²³8 C.F.R. § 214.14(a)(9).

²⁴INA § 101(a)(15)(U)(i)(IV); 8 C.F.R. § 214.14(b)(4).

²⁵8 C.F.R. § 214.14(a)(14).

²⁶8 C.F.R. § 214.14(a)(14).

²⁷8 C.F.R. § 214.14(a)(14)(i).

²⁸8 C.F.R. § 214.14(a)(14)(ii)(B).

²⁹8 C.F.R. § 214.14(a)(14)(iii).

³⁰INA § 101(a)(15)(U)(i)(I); 8 C.F.R. § 214.14(b)(1); see also “Showing Substantial Physical or Mental Abuse (Harm)” within the “Clearinghouse of materials” under ASISTA resources in Appendix B for more information on proving substantial abuse.

victim's physical person, or harm to or impairment of the emotional and psychological soundness of the victim.³¹

Substantiality of abuse is based on a number of factors including:

1. The **nature** of the hurt inflicted or suffered;
2. The **harshness** of the perpetrator's behavior;
3. The **cruelty** of harm suffered;
4. The **length** of the infliction of harm; and
5. The level of **permanent or serious harm** to the appearance, health, or physical or mental soundness of the victim, including the aggravation of pre-existing conditions.³²

A series of acts taken together may be considered to establish substantial physical or mental abuse, even where no particular act alone rises to that level.³³

Possession of Information

The applicant must possess **credible and reliable information** about the criminal activity of which he or she has been a victim, including specific proof regarding the criminal activity to help the investigation or prosecution.³⁴ When the victim is under 16 years of age at the time the qualifying criminal activity occurred or is otherwise incapacitated or incompetent, a parent, guardian, or "next friend" may possess evidence about the qualifying crime.³⁵ A "**next friend**" is a person who participates in a lawsuit in favor of an immigrant victim who is incapacitated, incompetent, or under the age of 16, and who has suffered substantial physical or mental abuse because of being a victim of a qualifying activity.³⁶

Law Enforcement Certification

An applicant must provide certification that he or she **was helpful, is being helpful, or is likely to be helpful** in the criminal investigation or prosecution of the crime.³⁷ Similar to possession of the required information, if the victim is under 16 years of age at the time that the qualifying criminal activity first occurred, or is otherwise incapacitated or incompetent, a parent, guardian, or "next friend" may provide the required help.³⁸ The applicant cannot decline or fail to supply "**reasonably requested**" assistance to law enforcement after any initial help and beginning the U visa application process.³⁹ To prove the helpfulness requirement, the applicant must obtain certification on **Form I-918, Supplement B**, from a

³¹8 C.F.R. § 214.14(a)(8).

³²8 C.F.R. § 214.14(b)(1).

³³8 C.F.R. § 214.14(b)(1).

³⁴INA § 101(a)(15)(U)(i)(II); 8 C.F.R. § 214.14(b)(2).

³⁵INA § 101(a)(15)(U)(i)(II); 8 C.F.R. § 214.14(b)(2).

³⁶8 C.F.R. § 214.14(a)(7).

³⁷INA § 101(a)(U)(i)(III); 8 C.F.R. § 214.14(b)(3).

³⁸8 C.F.R. § 214.14(b)(3).

³⁹8 C.F.R. § 214.14(b)(3).

federal, state, or local law enforcement official, or a judge investigating or prosecuting the criminal activity.⁴⁰

➤ *Practice Tip: Try to cultivate a good relationship with law enforcement agencies, and educate them on the certification process⁴¹ and the benefits of U visas to law enforcement agencies and the communities they protect.⁴² Try to build relationships before having a case that needs certification.⁴³*

➤ *Practice Tip: Explain to law enforcement that providing certification is not the agency granting the visa, but just providing USCIS with one piece of evidence in their determination.⁴⁴ Use the DHS Guide on U Visas for Law Enforcement Officers for this and for general work with law enforcement officers.⁴⁵*

This certification attests to the fact that the victim has been, is being, or is likely to be helpful in the detection, investigation, or prosecution of that criminal activity.⁴⁶ The person who can provide certification must be the head of the certifying agency, or any person in a supervisory role that has been specifically designated by the head of the certifying agency, or a federal, state or local judge.⁴⁷

➤ *Practice Tip: Remember that certification can come from other sources besides the police.⁴⁸*

➤ *Practice Tip: Try to look up as much information as possible regarding assistance, such as court records, before asking for certification.⁴⁹*

The certification provides specific details about the nature of the crime being detected, investigated, or prosecuted, and describes the applicant’s helpfulness. The certification can be issued prior to completing the investigation, even at the very early stages of the investigation into the criminal activity. It can also be issued during the investigation or after the investigation has terminated. There is no cut-off date for issuing a certification. **Form I-918, Supplement B must be certified within the 6 months immediately preceding the**

⁴⁰ For more information on law enforcement certification, see “U Visa Law Enforcement Certification Resource Guide” under Government Resources in Appendix B.

⁴¹ Interview with Gail Pendleton (Feb. 9, 2012); Interview with Rosa Gomez (Feb. 21, 2012); Interview with Lisa Hurlbutt (Mar. 14, 2012); Interview with Sameera Hafiz (Mar. 14, 2012).

⁴² Interview with Lisa Hurlbutt (Mar. 14, 2012).

⁴³ Interview with Gail Pendleton (Feb. 9, 2012).

⁴⁴ Interview with Gail Pendleton (Feb. 9, 2012); Interview with Rosa Gomez (Feb. 21, 2012); Interview with Sameera Hafiz (Mar. 14, 2012).

⁴⁵ Interview with Gail Pendleton (Feb. 9, 2012).

⁴⁶ 8 C.F.R. § 214.14(c)(2)(i).

⁴⁷ 8 C.F.R. § 214.14(a)(3).

⁴⁸ Interview with Sameera Hafiz (Mar. 14, 2012).

⁴⁹ Interview with Lisa Hurlbutt (Mar. 14, 2012).

filing of the U visa application.⁵⁰ The applicant must submit the U visa application with the completed, original certification form to USCIS before this expiration. To be eligible for lawful permanent residence, the victim has an ongoing responsibility to provide assistance to the investigation or prosecution when reasonably requested.⁵¹

➤ *Practice Tip: Encourage the law enforcement agency to have a written policy regarding how it wants the certification process to go, and to designate one person to receive and decide U visa certifications. This provides consistency in the process, and also makes education easier.*⁵²

Admissibility

A U visa applicant not only must prove his or her eligibility, but also must prove that he or she is **admissible** to the United State as a nonimmigrant.⁵³ If the applicant is not admissible, he or she must prove that a waiver is available.⁵⁴ The statutory grounds of inadmissibility are listed in **INA § 212(a)**.

➤ *Practice Tip: Grounds of inadmissibility can be one of the most difficult aspects of immigration law for a new practitioner. Consider asking someone with more experience for help if there is a criminal issue.*⁵⁵

Some frequent grounds of inadmissibility include:

1. Entering without inspection;
2. Criminal convictions;
3. Security grounds;
4. Fraud or Misrepresentation;
5. False claims to U.S. citizenship;
6. Health conditions or substance abuse;
7. Prior deportations; and
8. Unlawful presence.⁵⁶

⁵⁰8 C.F.R. § 214.14(c)(2)(i).

⁵¹ For a more thorough discussion of law enforcement certification, see “U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement” under government resources in Appendix B.

⁵² Interview with Lisa Hurlbutt (Mar. 14, 2012).

⁵³For a more thorough discussion of admissibility, see “Overcoming Inadmissibility for U Visa Applicants” under Gail Pendleton Resources in Appendix C.

⁵⁴8 C.F.R. § 214.1(a)(3).

⁵⁵ Interview with Christie Popp (Feb. 24, 2012).

⁵⁶ INA § 212(a); *see also* NATIONAL IMMIGRANT JUSTICE CENTER, PRO BONO ATTORNEY MANUAL ON IMMIGRATION RELIEF FOR CRIME VICTIMS: U VISAS, 23 (2011).

➤ *Practice Tip: Grounds of inadmissibility most likely to arise include single or, less frequently and more seriously, multiple unlawful entries, criminal convictions (important to determine any arrests, as dispositions must be provided), past immigration fraud or misrepresentation, and helping others enter unlawfully, such as children. Ask clients questions in many different ways to be sure that they understand, especially as to arrest history which is frequently confusing to them.*⁵⁷

➤ *Practice Tip: Send your client's fingerprints for an FBI criminal background check for a full and accurate account of all crimes committed by your client.*⁵⁸

➤ *Practice Tip: A client who is undocumented is usually not a big problem unless there were multiple reentries, if there are no other inadmissibility issues.*⁵⁹

Note that there is no ground of inadmissibility for individuals who entered the United States lawfully but have stayed beyond their authorized period of stay.⁶⁰

Waivers of Grounds of Inadmissibility

USCIS has discretion to waive all grounds of inadmissibility listed in INA § 212(a) for a U visa by waiver request, except **INA § 212(a)(3)(E)** (relating to Nazi persecution, genocide, torture, and extrajudicial killing).⁶¹ The applicant must file **Form I-192** to request a waiver and pay the current fee or request a fee waiver.⁶² This should be included with the I-918 application.

➤ *Practice Tip: Address inadmissibility proactively, and make arguments for waivers.*⁶³

➤ *Practice Tip: Waivers are more difficult to obtain for drug, gang, and physical assault crimes than for illegal entry.*⁶⁴

Filing the Application

To apply for a U visa, the applicant needs to complete **Form I-918**.⁶⁵ Though there is **no application fee** for this form, a fee may be required for other aspects of the application, such

⁵⁷ Interview with Lisa Hurlbutt (Mar. 14, 2012).

⁵⁸ Interview with Rosa Gomez (Feb. 21, 2012); Interview with Christie Popp (Feb. 24, 2012).

⁵⁹ Interview with Gail Pendleton (Feb. 9, 2012).

⁶⁰ See INA § 212(a).

⁶¹ INA § 212(d)(14); 8 C.F.R. § 212.17(b)(1).

⁶² 8 C.F.R. § 212.17(a).

⁶³ Interview with Gail Pendleton (Feb. 9, 2012).

⁶⁴ Interview with Rosa Gomez (Feb. 21, 2012).

as the biometrics fee or if a form for a waiver is required. Additionally, the applicant does not need to file Form I-765 for employment authorization, as this information is taken directly from the I-918. Employment authorization is automatically granted when the U visa application is granted.⁶⁶ A **cap of 10,000 U visas** exists for each year, but this cap applies only to **principal applicants**, not to derivative family members.⁶⁷

Any **eligible applicants** who are not granted a U visa because of the annual cap will be placed on a **waiting list**.⁶⁸ Priority on the waiting list will be determined by the **date the petition was filed** with the oldest petitions receiving the highest priority.⁶⁹ USCIS will grant **deferred action or parole** to U visa applicants and qualifying family members while the principal applicants are on the waiting list.⁷⁰ USCIS may authorize employment for these applicants and qualifying family members, at its discretion.⁷¹

Derivative Family Members

When a victim is applying for U nonimmigrant status, he or she may also apply for admission of **immediate family members**.⁷² In the case of a victim under the age of 21, the victim's parents, unmarried siblings under the age of 18, spouses, and unmarried children under the age of 21 will be eligible for derivative status.⁷³ In the case of a victim who is 21 years old or older, his or her spouse and unmarried children will be eligible for derivative status.⁷⁴ The perpetrator of the criminal activity cannot obtain derivative status as a qualifying family member.⁷⁵ There is **no annual limit** of U visas for derivative family members.⁷⁶ A victim can apply for a derivative family member using the **I-918, Supplement A** application form, which may be filed with the principal I-918 application, or at a subsequent time.⁷⁷ Additionally, the application for derivative family members must include **Form I-765** if the family member wishes to receive work authorization.⁷⁸

⁶⁵ For a detailed list of material for the U visa application, see “Required material for U **Nonimmigrant Visa** application” in Appendix A.

⁶⁶ 8 C.F.R. § 214.14(c)(7).

⁶⁷ 8 C.F.R. § 214.14(d)(1).

⁶⁸ 8 C.F.R. § 214.14(d)(2).

⁶⁹ 8 C.F.R. § 214.14(d)(2).

⁷⁰ 8 C.F.R. § 214.14(d)(2).

⁷¹ 8 C.F.R. § 214.14(d)(2); 8 C.F.R. § 274a.12(c)(14).

⁷² INA § 101(a)(15)(U)(ii).

⁷³ 8 C.F.R. § 214.14(f).

⁷⁴ 8 C.F.R. § 214.14(f).

⁷⁵ 8 C.F.R. § 214.14(f)(1).

⁷⁶ 8 C.F.R. § 214.14(d)(2).

⁷⁷ 8 C.F.R. § 214.14(f)(2); see “[Consular Processing for Overseas Derivative T and U Nonimmigrant Status Family Members: Questions and Answers](#)” for more information of filing a derivative U application for a family member overseas.

⁷⁸ 8 C.F.R. § 214.14(f)(7).

➤ *Practice Tip: When a derivative (U-3) child turns 21, he or she currently will lose U nonimmigrant status (although a “fix” of this problem is under consideration by policy makers at DHS), which poses a problem if the necessary three years have not accrued in order to adjust status. The age of children can be a way to prioritize cases.*⁷⁹

➤ *Practice Tip: Inadmissibility based on convictions for crimes tends to be more problematic, especially for juvenile derivatives with a criminal background who show no rehabilitation and for those in detention, since rehabilitation is hard to show for them.*⁸⁰

Adjustment of Status to Lawful Permanent Resident for Principals and Derivatives

To adjust status to lawful permanent resident, the U nonimmigrant⁸¹ must file **Form I-485**.⁸² U visa adjustment is governed by INA 245(m).⁸³ A victim must meet the following requirements to apply for permanent residency:

1. Was **lawfully admitted** to the United States as a U nonimmigrant and continues to hold such status at the time of application;⁸⁴
2. Has **continuous physical presence** for 3 years;⁸⁵
 - a. **Continuous physical presence** means the period of time that the non-citizen has been physically present in the United States and must be a continuous period of at least 3 years since the date of admission as a U nonimmigrant continuing through the date of the conclusion of adjudication of the application for adjustment of status.⁸⁶
 - b. If the non-citizen has departed from the United States for any **single period in excess of 90 days** or for any periods **in the aggregate exceeding 180 days**, the applicant must include a certification from the agency that signed the Form I-918, Supplement B, in support of the non-citizen's U nonimmigrant status that the absences were necessary to assist in the criminal investigation or prosecution or were otherwise justified.⁸⁷

⁷⁹ Interview with Lisa Hurlbutt (Mar. 14, 2012).

⁸⁰ Interview with Gail Pendleton (Feb. 9, 2012).

⁸¹ This section applies to applicants granted principal U nonimmigrant status (U-1), as well as those granted derivative U nonimmigrant status (U-2, U-3, U-4, and U-5). See 8 C.F.R. § 245.24(a)(4).

⁸² For a detailed list of material for the adjustment of status application, see “Required material for U Nonimmigrant Visa Adjustment of Status application” in Appendix A.

⁸³ For a more thorough discussion of adjustment of status for a U nonimmigrant, see “U Visa Adjustment of Status Guide” under in Appendix D.

⁸⁴ 8 C.F.R. § 245.24(b).

⁸⁵ 8 C.F.R. § 245.24(b).

⁸⁶ 8 C.F.R. § 245.24(a)(1).

⁸⁷ 8 C.F.R. § 245.24(a)(1).

3. Is not **inadmissible under section 212(a)(3)(E)** of the Act⁸⁸ (Note: Applicants do not have to establish that they are admissible; the inadmissibility grounds at **212(a)** do not apply);
4. Has not **unreasonably refused to provide assistance** to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the non-citizen was granted U nonimmigrant status;⁸⁹
 - a. **Refusal to provide assistance in a criminal investigation or prosecution** is the refusal by the non-citizen to provide assistance to a law enforcement agency or official that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the non-citizen was granted U nonimmigrant status.⁹⁰
 - b. DHS will determine whether the non-citizen's refusal was unreasonable under the totality of the circumstances based on all available affirmative evidence, and may take into account such factors as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the non-citizen for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe traumatization (both mental and physical), and the age and maturity of the applicant.⁹¹
5. Establishes to the satisfaction of the Secretary of Homeland Security that the non-citizen's presence in the United States is justified on **humanitarian grounds**, to **ensure family unity**, or is in the **public interest**;⁹² and
6. Merits a favorable **exercise of discretion**.⁹³

A victim who has had his or her **U status revoked** will not be eligible to adjust to lawful permanent resident.⁹⁴

Derivative Adjustment of Status

A U nonimmigrant may also file a **derivative application for adjustment of status** for a spouse, child, or parent, if the nonimmigrant is a child, who **has not held U nonimmigrant status**.⁹⁵ To file as a derivative, the applicant must show that:

1. The qualifying family member has **never held U nonimmigrant status**;⁹⁶
2. The **qualifying family relationship** exists at the time of the principal's adjustment and continues to exist through the adjudication of the adjustment or issuance of the immigrant visa for the qualifying family member;⁹⁷

⁸⁸8 C.F.R. § 245.24(b).

⁸⁹8 C.F.R. § 245.24(b).

⁹⁰8 C.F.R. § 245.24(a)(5).

⁹¹8 C.F.R. § 245.24(a)(5).

⁹²8 C.F.R. § 245.24(b).

⁹³8 C.F.R. § 245.24(f).

⁹⁴8 C.F.R. § 245.24(c).

⁹⁵8 C.F.R. § 245.24(g).

⁹⁶8 C.F.R. § 245.24(g)(1).

⁹⁷8 C.F.R. § 245.24(g)(2).

3. The qualifying family member or the principal U nonimmigrant would suffer **extreme hardship** if the qualifying family member is not allowed to remain in or enter the United States;⁹⁸ and
4. The **principal U nonimmigrant has adjusted status** to that of a lawful permanent resident, has a pending application for adjustment of status, or is concurrently filing an application for adjustment of status.⁹⁹

⁹⁸8 C.F.R. § 245.24(g)(3).

⁹⁹8 C.F.R. § 245.24(g)(4).

T Visas

Description

The **T visa** is a nonimmigrant visa that was created by the **Victims of Trafficking and Violence Protection Act** to combat the trafficking in persons.¹⁰⁰ Five thousand T visas are available each year. The T visa allows trafficking victims to live and work legally in the United States for up to four years. Further, it allows eligible victims to adjust to permanent residency after three years of T nonimmigrant status. Similar to the U visa, a victim applying for the T visa does not need to be related to the perpetrator of the trafficking, and the perpetrator does not need to have legal immigration status. A trafficking victim applies for the T visa by filing **Form I-914** with the USCIS Vermont Service Center. An applicant who is granted T nonimmigrant status is qualified for employment authorization, and may apply for derivative family members under this visa.

➤ *Practice Tip: Serving an individual client through both a domestic violence and human trafficking lens increases the likelihood that the entirety of the client's needs will be addressed appropriately.*¹⁰¹

Eligibility Requirements

To be **eligible for a T visa**, the nonimmigrant must:

1. Be or have been a **victim of severe forms of trafficking in humans**;¹⁰²
2. Be **physically present in the U.S.**, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry, on account of such trafficking, which includes physical presence on account of the non-citizen having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking;¹⁰³
3. **Comply with reasonable requests from law enforcement agencies** for assistance in the investigation or prosecution of human trafficking;¹⁰⁴ UNLESS
 - a. physically or psychologically unable to assist law enforcement or
 - b. under the age of 18¹⁰⁵
4. Demonstrate **extreme hardship involving severe and unusual harm** if removed from the US.¹⁰⁶

¹⁰⁰ For more discussion of human trafficking victims see “Meeting the Legal Needs of Human Trafficking Victims: An Introduction for Domestic Violence Attorneys & Advocates” and “Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children’s Attorneys & Advocates” under the American Bar Association resources in Appendix B.

¹⁰¹ “Meeting the Legal Needs of Human Trafficking Victims: An Introduction for Domestic Violence Attorneys & Advocates,” 6 under American Bar Association resources in Appendix B.

¹⁰² INA § 101(a)(15)(T)(i)(I).

¹⁰³ INA § 101(a)(15)(T)(i)(II).

¹⁰⁴ INA § 101(a)(15)(T)(i)(III).

¹⁰⁵ INA § 101(a)(15)(T)(i)(III).

¹⁰⁶ INA § 101(a)(15)(T)(i)(IV).

Victim of Severe Human Trafficking

“Severe Forms of Trafficking in Humans” is defined as:

1. **Sex trafficking** in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
 - a. “**Sex trafficking**” is further defined as the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.¹⁰⁷
 - b. “**Commercial sex act**” means any sex act on account of which anything of value is given to or received by any person.¹⁰⁸
 - c. “**Coercion**” is defined as:
 - i. Threats of serious harm to or physical restraint against any person;
 - ii. Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or
 - iii. The abuse or threatened abuse of the legal process.¹⁰⁹
2. The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.¹¹⁰ This is often referred to as “**labor trafficking**.”
 - a. “**Debt bondage**” means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.¹¹¹
 - b. “**Involuntary servitude**” includes a condition of servitude induced by means of:
 - i. Any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or
 - ii. The abuse or threatened abuse of the legal process.¹¹²
 - c. “**Peonage**” is a status or condition of involuntary servitude based upon real or alleged indebtedness.¹¹³

Thus, to qualify for labor trafficking, three steps of requirements must be met – a process, a means, and an ends. Labor trafficking requires the process of the victimization (“recruitment, harboring, transportation, provision, or obtaining of a person for labor or services”), the means used to obtain the victim (“through the use of force, fraud, or coercion”), and the ends or purpose for obtaining the victim (for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery). Sex trafficking forgoes the

¹⁰⁷22 U.S.C. §7102(9).

¹⁰⁸22 U.S.C. §7102(3).

¹⁰⁹22 U.S.C. §7102(2).

¹¹⁰22 U.S.C. §7102(8).

¹¹¹22 U.S.C. §7102(4).

¹¹²22 U.S.C. §7102(5).

¹¹³8 C.F.R. § 214.11(a).

process, but parallels the means used (“induced by force, fraud, or coercion”), as well as the ends or purpose (to induce “a commercial sex act”). Additionally, in the case where the victim is under the age of 18, only the ends or purpose is required, omitting the need for a use of force, fraud or coercion.¹¹⁴

➤ *Practice Tip: Remember that the T visa can be used for individual cases, and not only large trafficking operations.*¹¹⁵

Physical Presence on account of Trafficking

The requirement of being **physically present in the United States on account of trafficking** extends to a victim who:

1. Is present because he or she **is being subjected** to a severe form of trafficking in persons;
2. **Was recently liberated** from a severe form of trafficking in persons; or
3. Was subject to severe forms of trafficking in persons at some point in the past and whose **continuing presence in the United States is directly related** to the original trafficking in persons.¹¹⁶

Thus, the focus of the physical presence requirement is **not on the manner of or reason for a victim’s entry** into the United States, but rather on whether the **victim’s current presence** is on account of the trafficking. However, if the victim has the chance to escape the traffickers before the trafficking comes to the attention of law enforcement, the victim must show that he or she did not have a clear chance to leave the United States in the interim.¹¹⁷ Additionally, if the victim voluntarily leaves or is removed from the United States after an incident of trafficking, he or she will not be deemed to be physically present unless his or her **reentry was due to a continuation of the previous trafficking**, or a new incident of trafficking.¹¹⁸

Compliance with Reasonable Requests from Law Enforcement

A “**reasonable request for assistance**” is defined as a reasonable request made by a law enforcement officer or prosecutor to a victim of a severe form of trafficking in persons to assist law enforcement authorities in the investigation or prosecution of the acts of trafficking in persons.¹¹⁹ A “**law enforcement agency**” is any Federal law enforcement agency that has the responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons.¹²⁰ The “**reasonableness**” of the request depends on the totality of the circumstances taking into account general law enforcement and prosecutorial

¹¹⁴ See Kavitha Sreeharsha and Maria Joes Fletcher, HUMAN TRAFFICKING AND THE T-VISA, 4-5 (Legal Momentum).

¹¹⁵ Interview with Gail Pendleton (Feb. 9, 2012).

¹¹⁶ 8 C.F.R. § 214.11(g).

¹¹⁷ 8 C.F.R. § 214.11(g)(2).

¹¹⁸ 8 C.F.R. § 214.11(g)(3).

¹¹⁹ 8 C.F.R. § 214.11(a).

¹²⁰ 8 C.F.R. § 214.11(a).

practices, the nature of the victimization, and the specific circumstances of the victim, including fear, severe traumatization, and the age and maturity of young victims.¹²¹

Two general exceptions to the compliance requirement are:

1. When the victim has **not yet reached 18 years of age**;¹²² or
2. When the victim is unable to cooperate with the request due to **severe physical or psychological trauma**.¹²³

Evidence of compliance with reasonable requests from law enforcement agencies for assistance in the investigation or prosecution may include primary or secondary evidence.

1. **Primary evidence** of compliance consists of a **law enforcement agency endorsement** describing the assistance provided by the victim, though this endorsement is not required.¹²⁴
2. **Credible secondary evidence** and affidavits may be submitted to show compliance and that primary evidence is nonexistent or unavailable, and should demonstrate a good faith effort to obtain an endorsement from a law enforcement agency.¹²⁵
 - a. The statement or evidence must show that a law enforcement agency that has responsibility and authority for the detection, investigation, or prosecution of severe forms of trafficking in persons has information about such trafficking in persons, that the victim has complied with any reasonable request for assistance in the investigation or prosecution of such acts of trafficking, and, if the victim did not report the crime at the time, why the crime was not previously reported. The statement or evidence should demonstrate that good faith attempts were made to obtain the law enforcement agency endorsement, including what efforts the applicant undertook to accomplish these attempts. In addition, applicants may also submit their own affidavit and the affidavits of other witnesses.¹²⁶

Extreme Hardship Involving Severe and Unusual Harm

To be eligible for a T visa, a victim must demonstrate that he or she would **suffer extreme hardship involving severe and unusual harm** if removed from the United States.¹²⁷ A determination of extreme hardship is made on a case by case basis and all credible evidence regarding the nature and the scope of the hardship will be considered.¹²⁸ However, such a finding may not be based upon current or future economic detriment, or the lack of, or

¹²¹8 C.F.R. § 214.11(a).

¹²²INA § 101(a)(15)(T)(i)(III)(cc). The regulations, which state that the victim must be under the age of 15 to be exempt from the compliance requirement, are not as up to date as the statute on this point.

¹²³INA § 101(a)(15)(T)(i)(III)(bb).

¹²⁴8 C.F.R. § 214.11(h)(1).

¹²⁵8 C.F.R. § 214.11(h)(2).

¹²⁶8 C.F.R. § 214.11(h)(2).

¹²⁷8 C.F.R. § 214.11(i).

¹²⁸8 C.F.R. § 214.11(i)(3).

disruption to, social or economic opportunities.¹²⁹ Also, hardship to people other than the victim, such as hardship to family members, is not considered.¹³⁰ Factors in this determination include, but are not limited to:

1. The age and personal circumstances of the applicant;
2. Serious physical or mental illness of the applicant that necessitates medical or psychological attention not reasonably available in the foreign country;
3. The nature and extent of the physical and psychological consequences of severe forms of trafficking in persons;
4. The impact of the loss of access to the United States courts and the criminal justice system for purposes relating to the incident of severe forms of trafficking in persons or other crimes perpetrated against the applicant, including criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection;
5. The reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of trafficking in persons;
6. The likelihood of re-victimization and the need, ability, or willingness of foreign authorities to protect the applicant;
7. The likelihood that the trafficker in persons or others acting on behalf of the trafficker in the foreign country would severely harm the applicant; and
8. The likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict.¹³¹

Admissibility

A T visa applicant not only must prove his or her eligibility, but also must prove that he or she is **admissible** to the United States as a nonimmigrant.¹³² If the applicant is not admissible, he or she must prove that a waiver is available.¹³³ The statutory grounds of inadmissibility are listed in **INA § 212(a)**.

Some frequent grounds of inadmissibility include:

1. Entering Without Inspection
2. Criminal convictions
3. Security grounds
4. Fraud/Misrepresentation
5. False claims to U.S. citizenship, including unlawful voting and falsification of I-9 form for employment
6. Health Conditions or Substance Abuse
7. Prior Deportations
8. Unlawful presence¹³⁴

¹²⁹8 C.F.R. § 214.11(i)(1).

¹³⁰8 C.F.R. § 214.11(i)(2).

¹³¹8 C.F.R. § 214.11(i)(1).

¹³²8 C.F.R. § 214.1(a)(3).

¹³³8 C.F.R. § 214.1(a)(3).

¹³⁴ INA § 212(a); *see also* National Immigrant Justice Center, PRO BONO ATTORNEY MANUAL ON IMMIGRATION RELIEF FOR CRIME VICTIMS: U VISAS, 23 (2011).

➤ *Practice Tip: Send your client's fingerprints for an FBI criminal background check for a full and accurate account of all crimes committed by your client.*¹³⁵

➤ *Practice Tip: Victims sometimes engage in criminal acts that may not appear related to trafficking, but are actually the result of it. This can cause law enforcement officers to view them more as offenders than victims.*¹³⁶

Note that there is no ground of inadmissibility for individuals who entered the United States lawfully but have stayed beyond their authorized period of stay.¹³⁷

Waivers of Grounds of Inadmissibility

USCIS has discretion to waive all grounds of inadmissibility listed in **INA § 212(a)** for a T visa by waiver request, except **INA § 212(a)(3), (10)(C), and (10)(E)**.¹³⁸ Special consideration will also be given when the inadmissibility was caused by or incident to the acts that caused the victimization.¹³⁹ Further, criminal and related grounds listed in **INA § 212(a)(2)** will only be waived in exceptional cases, unless the grounds were caused by or related to the victimization described under **INA § 101(a)(15)(T)**.¹⁴⁰ The inadmissibility ground of being a public charge does not apply to a T visa applicant.¹⁴¹ The applicant must file **Form I-192** to request a waiver and pay the current fee or request a fee waiver.¹⁴² This should be included in the I-914 application.

➤ *Practice Tip: Address inadmissibility proactively, and make arguments for waivers.*¹⁴³

Filing the Application

To apply for a T visa, the applicant needs to complete **Form I-914**.¹⁴⁴ Though there is **no application fee** for this form, a fee may be required for other aspects of the application, such as the biometrics fee or if an application for a waiver is required. Additionally, the applicant does not need to file Form I-765 for employment authorization, as this information is taken

¹³⁵ Interview with Rosa Gomez (Feb. 21, 2012); Interview with Christie Popp (Feb. 24, 2012).

¹³⁶ "Meeting the Legal Needs of Child Trafficking Victims: An Introduction for Children's Attorneys & Advocates," 13 under American Bar Association resources in Appendix B.

¹³⁷ See INA § 212(a).

¹³⁸ INA § 212(d)(13)(A); 8 C.F.R. § 212.16(b)(1). These grounds of inadmissibility are security and related grounds, international child abduction, and former citizens who renounced their citizenship to avoid taxation.

¹³⁹ 8 C.F.R. § 212.16(b)(1).

¹⁴⁰ 8 C.F.R. § 212.16(b)(2).

¹⁴¹ INA § 212(d)(13)(A); 8 C.F.R. § 214.11(k)(1).

¹⁴² 8 C.F.R. § 212.16(a).

¹⁴³ Interview with Gail Pendleton (Feb. 9, 2012).

¹⁴⁴ For a detailed list of material for the T visa application, see "Required material for **T Nonimmigrant Visa** application" in Appendix A.

directly from the I-914. Employment authorization is automatically granted when the T visa application is granted.¹⁴⁵ A **cap of 5,000 T visas** exists for each year, but this cap applies only to **principal applicants**, not to derivative family members.¹⁴⁶

➤ *Practice Tip: Unlike U visas, the allotment of T visas is not fully utilized.*¹⁴⁷

Once this cap is reached in any given year, applications will continue to be reviewed in the order in which they are received.¹⁴⁸ A determination will be made on the applicant's eligibility for a T visa, but **the T visa will not be issued at that time.**¹⁴⁹ Eligible applicants who are not granted a T visa due to the cap are placed on a **waiting list.**¹⁵⁰ While on the waiting list, the applicant will maintain his or her current means to prevent removal (**deferred action, parole, or stay of removal**) and any employment authorization.¹⁵¹ Priority on the waiting list is determined by the **date the application was properly filed**, with the oldest applications receiving the highest priority.¹⁵²

➤ *Practice Tip: Given that trafficking often intersects with other crimes, such as domestic violence, it might be possible to pursue multiple remedies concurrently for a client who is a victim of human trafficking.*¹⁵³

Two Step Process: Bona Fide Application + Adjudication

Once the application for a T visa has been submitted, an initial review will take place to determine if the application is **bona fide.**¹⁵⁴ A determination of bona fide application will be made if the application is **properly filed**, the application is **complete**, **no appearance of fraud** exists, and the application presents **prima facie evidence of each eligibility requirement.**¹⁵⁵ For an application to be deemed bona fide, the applicant must not be inadmissible under INA § 212(a),¹⁵⁶ although the inadmissibility ground of being a public charge does not apply to a T visa application.¹⁵⁷ The application may also be deemed bona

¹⁴⁵ 8 C.F.R. § 214.11(l)(4).

¹⁴⁶ 8 C.F.R. § 214.11(m); 8 C.F.R. § 214.11(o)(9).

¹⁴⁷ Interview with Gail Pendleton (Feb. 9, 2012).

¹⁴⁸ 8 C.F.R. § 214.11(m)(1).

¹⁴⁹ 8 C.F.R. § 214.11(m)(1).

¹⁵⁰ 8 C.F.R. § 214.11(m)(2).

¹⁵¹ 8 C.F.R. § 214.11(m)(2).

¹⁵² 8 C.F.R. § 214.11(m)(2).

¹⁵³ "Meeting the Legal Needs of Human Trafficking Victims: An Introduction for Domestic Violence Attorneys & Advocates," 21 under American Bar Association resources in Appendix B.

¹⁵⁴ 8 C.F.R. § 214.11(k)(1).

¹⁵⁵ 8 C.F.R. § 214.11(k)(1).

¹⁵⁶ 8 C.F.R. § 214.11(k)(1).

¹⁵⁷ INA § 212(d)(13); 8 C.F.R. § 214.11(k)(1).

fide once an applicant receives a waiver for any of the other grounds of inadmissibility.¹⁵⁸ Waivers of inadmissibility grounds are discretionary, and require an affirmative request.¹⁵⁹ If an application is incomplete, or if evidence of a requirement is insufficient, USCIS will request additional evidence, issue a notice of intent to deny, or adjudicate the application on its merits.¹⁶⁰ If the application is bona fide, USCIS will then conduct ade novo review and final adjudication of the application.¹⁶¹

Derivative Family Members

When a victim is applying for T nonimmigrant status, he or she may also apply for admission of **immediate family members**.¹⁶² In the case of a victim **under the age of 21**, the victim's **spouse, children, and unmarried siblings** under the age of 18 will be eligible for this derivative status.¹⁶³ In the case of a victim who is **age 21 or older**, his or her **spouse and children** will be eligible for this derivative status.¹⁶⁴ **Parents and siblings** under the age of 18 may also be eligible if they face a **present danger** as a result of the victim having escaped from trafficking or cooperation with law enforcement.¹⁶⁵ Derivative applications must also show that **extreme hardship** would result, either on the part of the family member or on the principal, if the family member was not admitted or, in the case where the family member is present in the United States, was removed.¹⁶⁶ Factors used in evaluating extreme hardship include, but are not limited to:

1. The need to provide financial support to the principal non-citizen;
2. The need for family support for a principal non-citizen; or
3. The risk of serious harm, particularly bodily harm, to an immediate family member from the perpetrators of the severe forms of trafficking in persons.¹⁶⁷

A victim can apply for a derivative family member using the **I-914 Supplement A** application form, which may be filed with the principal I-914 application, or at a subsequent time.¹⁶⁸ Additionally, the application for derivative family members must include **Form I-765** if the family member wants to receive work authorization, as this will not automatically be granted, as is the case with the principal applicant.¹⁶⁹

¹⁵⁸8 C.F.R. § 214.11(k)(1).

¹⁵⁹ 8 C.F.R. § 214.11(k)(1); *See* INA § 212(h) and Form I-601.

¹⁶⁰8 C.F.R. § 214.11(k)(2).

¹⁶¹8 C.F.R. § 214.11(l).

¹⁶²INA § 101(a)(15)(T)(ii); 8 C.F.R. § 214.11(o)(1).

¹⁶³INA § 101(a)(15)(T)(ii)(I).

¹⁶⁴INA § 101(a)(15)(T)(ii)(II).

¹⁶⁵INA § 101(a)(15)(T)(ii)(III).

¹⁶⁶8 C.F.R. § 214.11(o)(5).

¹⁶⁷8 C.F.R. § 214.11(o)(5).

¹⁶⁸ 8 C.F.R. § 214.11(o)(2); see "[Consular Processing for Overseas Derivative T and U Nonimmigrant Status Family Members: Questions and Answers](#)" for more information of filing a derivative T application for a family member overseas.

¹⁶⁹8 C.F.R. § 214.11(o)(10).

Adjustment of Status to Lawful Permanent Resident for Principals and Derivatives

To adjust status to lawful permanent resident, the T nonimmigrant must file **Form I-485**.¹⁷⁰ A T nonimmigrant¹⁷¹ must meet the following requirements to apply for permanent residency:

1. Was **lawfully admitted** to the United States as a T nonimmigrant, and continues to hold such status at the time of application;¹⁷²
2. Has been **physically present** in the United States for a continuous period of at least 3 years since the first date of lawful admission as a T-1 nonimmigrant or has been physically present in the United States for a continuous period during the investigation or prosecution of acts of trafficking and the Attorney General has determined that the investigation or prosecution is complete, whichever period of time is less;¹⁷³
 - a. If the applicant has departed from the United States for **any single period in excess of 90 days** or for any periods **in the aggregate exceeding 180 days**, the applicant shall be considered to have failed to maintain continuous physical presence in the United States¹⁷⁴
3. Is **admissible** to the United States, or otherwise has been **granted a waiver** of any applicable ground of inadmissibility at the time of examination for adjustment;¹⁷⁵
4. Has been a person of **good moral character** since first being lawfully admitted as a T nonimmigrant and until the USCIS completes the adjudication for adjustment of status;¹⁷⁶
5. Has **complied with any reasonable request for assistance** in the investigation or prosecution of acts of trafficking, or would suffer extreme hardship involving unusual and severe harm upon removal;¹⁷⁷ and
6. Merits a favorable **exercise of discretion**.¹⁷⁸

In **proving good moral character**, the victim must submit the following evidence:

1. An affidavit from the applicant attesting to his or her good moral character, accompanied by a local police clearance or a state-issued criminal background check from each locality or state in the United States in which the applicant has resided for 6 or more months during the requisite period in continued presence or T-1 nonimmigrant status.¹⁷⁹

¹⁷⁰For a detailed list of material for the adjustment of status application, see “Required material for **T Nonimmigrant Visa Adjustment of Status** application” and “Required material for **T Nonimmigrant Derivative Visa Adjustment of Status** application” in Appendix A.

¹⁷¹This section applies to applicants granted principal T nonimmigrant status, as well as those granted derivative T nonimmigrant status. See 8 C.F.R. § 245.23(a) and 8 C.F.R. § 245.23(b).

¹⁷²8 C.F.R. § 245.23(a)(2).

¹⁷³8 C.F.R. § 245.23(a)(3).

¹⁷⁴8 C.F.R. § 245.23(a)(3).

¹⁷⁵8 C.F.R. § 245.23(a)(4).

¹⁷⁶8 C.F.R. § 245.23(a)(5).

¹⁷⁷8 C.F.R. § 245.23(a)(6).

¹⁷⁸8 C.F.R. § 245.23(e)(3).

¹⁷⁹8 C.F.R. § 245.23(g)(1).

2. If police clearances, criminal background checks, or similar reports are not available for some or all locations, the applicant may include an explanation and submit other evidence with his or her affidavit.¹⁸⁰
3. USCIS will consider other credible evidence of good moral character, such as affidavits from responsible persons who can knowledgeably attest to the applicant's good moral character.¹⁸¹

In addition, the victim must show that **discretion should be exercised** in his or her favor.¹⁸² **Mitigating evidence** may be submitted to offset any adverse factors, and the victim may have to show **exceptional and extremely unusual hardship** as a result of a denial of adjustment.¹⁸³

¹⁸⁰8 C.F.R. § 245.23(g)(2).

¹⁸¹8 C.F.R. § 245.23(g)(3).

¹⁸²8 C.F.R. § 245.23(e)(3).

¹⁸³8 C.F.R. § 245.23(e)(3).

VAWA Self-Petition

Description

The VAWA Self-Petition was created by the **Violence Against Women Act (VAWA)** to provide immigrant victims with a legal remedy for obtaining a legal immigration status independently of their abusers. The self-petition allows the victim of abuse who is otherwise eligible for family-based immigration to adjust status without relying on the abuser for the petition. However, unlike the U and T visas, a self-petition requires a family relationship, such as spousal or parent-child, with the abuser, and requires the abuser to be a U.S. citizen or lawful permanent resident (“LPR”). A victim applies for a VAWA self-petition by filing **Form I-360** with the USCIS Vermont Service Center. Once a self-petition is approved, the victim may apply for adjustment of status to lawful permanent resident. This will provide the victim with a route for employment authorization, as well as the ability to apply for certain derivative family members.

Attorneys and advocates working with this remedy should also have an understanding of family-based immigration. Family-based immigration takes two routes: visas for immediate relatives of U.S. citizens and family preference visas.¹⁸⁴ Visas for the immediate relatives of U.S. citizens are not subjected to limitations, and thus eligible family members are able to apply to adjust to LPR status immediately.¹⁸⁵ **Immediate relatives** of U.S. citizens are defined as spouses, unmarried children under the age of 21, and parents of citizens who are at least 21 years old.¹⁸⁶ Family preference visas, however, are limited each year based on one of four preference categories and the country of origin.¹⁸⁷ The **first preference** category consists of unmarried sons and daughters of U.S. citizens.¹⁸⁸ The **second preference** category consists of the spouses, children, and unmarried sons and daughters of LPRs.¹⁸⁹ The **third preference** category consists of married sons and daughters of U.S. citizens.¹⁹⁰ Finally, the **fourth preference** category consists of brothers and sisters of U.S. citizens who are at least 21 years old.¹⁹¹ When the number of qualified applicants exceeds the quota, or the number of available visas, the eligible applicant will have to wait for an available visa. Visas are issued in chronological order based on when the application is filed, also called the “**priority date.**” Once the priority date is reached, a visa is issued and the applicant may apply for adjustment of status. Understanding the mechanics of the family-based immigration scheme is important when handling VAWA and related cases because family-based immigration underlies the VAWA remedies.

¹⁸⁴See National Immigrant Justice Center, PRO BONO ATTORNEY MANUAL ON LEGAL IMMIGRATION PROTECTIONS FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, 20-21 (2011).

¹⁸⁵INA § 201(b)(2)(A)(i).

¹⁸⁶INA § 201(b)(2)(A)(i).

¹⁸⁷INA § 203(a).

¹⁸⁸INA § 203(a)(1).

¹⁸⁹INA § 203(a)(2).

¹⁹⁰INA § 203(a)(3).

¹⁹¹INA § 203(a)(4).

Eligibility Requirements

In order for an applicant to file for a VAWA self-petition, he or she must prove:

1. A **qualifying relationship**;
2. That the **abuser was a U.S. citizen or LPR**;
3. A **legal and good faith marriage**, in the case that the qualifying relationship is that of a spouse;
4. **Battery or extreme cruelty**;
5. **Residence** with the abuser; and
6. **Good moral character**.¹⁹²

Qualifying Relationship

The following persons can apply for a VAWA self-petition:

1. An **abused spouse** of a U.S. citizen or LPR;¹⁹³
2. A **non-abused spouse** of a U.S. citizen or LPR **whose child is abused** by the U.S. citizen or LPR spouse, even if the child is not related to the U.S. citizen or LPR abuser;¹⁹⁴
3. **Abused parents** of a U.S. citizen children where the abusive child is 21 years of age or older;¹⁹⁵
4. An **abused child** of a U.S. citizen or LPR parent;¹⁹⁶ or
5. An **abused “intended spouse”** of a U.S. citizen or LPR.¹⁹⁷
 - a. The term **“intended spouse,”** means an individual who believes that she or he has married a U.S. citizen or LPR and for whom a marriage ceremony was actually performed, but whose marriage is not legitimate solely because of the U.S. citizen’s or LPR’s bigamy (i.e. previously married and did not legally terminate that marriage before entering into the current marriage).¹⁹⁸

Immigration Status of Abuser

When applying for a VAWA self-petition, the applicant must prove that the **abuser is a U.S. citizen or LPR**.¹⁹⁹ The following circumstances may also allow for the requisite status of the abuser:

1. If the abuser **loses or renounces his or her U.S. citizenship or LPR status**, the victim may still qualify for a self-petition, but the application must be filed within 2 years of the date the abuser loses or renounces his U.S. citizenship or LPR status.²⁰⁰

¹⁹²See INA § 204(a); see also “Document Gathering for Self-Petitioning Under the Violence Against Women Act” under Immigrant Legal Resource Center resources in Appendix B for more information on providing evidence for each of the requirements.

¹⁹³INA §204(a)(1)(A)(iii); INA §204(a)(1)(B)(ii).

¹⁹⁴INA §204(a)(1)(A)(iii)(I)(bb) and INA §204(a)(1)(B)(ii)(1)(bb).

¹⁹⁵INA §204(a)(1)(A)(vii).

¹⁹⁶INA §204(a)(1)(A)(iv); INA §204(a)(1)(B)(iii).

¹⁹⁷INA §204(a)(1)(A)(iii)(II)(aa)(BB) ; INA §204(a)(1)(B)(ii)(II)(aa)(BB) .

¹⁹⁸INA §101(a)(50).

¹⁹⁹INA §204(a)(1)(A)(iii)(I)(aa); INA §204 (a)(1)(B)(ii)(I)(aa); INA §204(a)(1)(A)(iv); INA §204(a)(1)(B)(iii).

2. An abuser losing proper immigration status after filing the self-petition application will have no effect on the applicant’s case for self-petition or adjustment of status.²⁰¹

➤ *Practice Tip: Note that proving the abuser’s status can be tricky when you have no access to information.*²⁰²

Marriage

If an applicant is filing as the spouse of a U.S. citizen or LPR, the applicant must establish that he or she is or was **legally married** to the U.S. citizen or LPR abuser, and that he or she married in “**good faith**,” and not for immigration purposes.²⁰³

Legal Marriage

A **legal marriage** for immigration purposes must be valid in the state or country in which it was executed, and must not violate public policy.²⁰⁴ If a marriage was not valid because the abuser’s prior or concurrent marriage was not legally terminated, a self-petitioner may nevertheless be filed if the applicant believed that the marriage was valid and can prove that the marriage ceremony was executed. This is referred to as an “**intended marriage**.”²⁰⁵

Good Faith Marriage

The applicant must prove that his or her marriage intent was in “**good faith**” and it was **not because of immigration purposes**.²⁰⁶ All credible relevant evidence of good faith at the time of marriage will be considered, and may include proof that one spouse has been listed as the other's spouse on insurance policies, property leases, income tax forms, or bank accounts; and testimony or other evidence regarding courtship, wedding ceremony, shared residence and experiences.²⁰⁷ The birth certificates of children born to the abuser and the spouse; police, medical, or court documents providing information about the relationship; and affidavits of persons with personal knowledge of the relationship may also be used to prove good faith.²⁰⁸ A self-petition will not be denied solely because the spouses are not living together and the marriage is no longer viable.²⁰⁹

➤ *Practice Tip: For VAWA self-petitioners, make sure that good faith marriage is heavily documented, as applications are often denied on this ground.*²¹⁰

²⁰⁰ INA §204(a)(1)(A)(iii)(II)(aa)(CC)(bbb); INA §204(a)(1)(B)(ii)(II)(aa)(CC)(aaa).

²⁰¹ INA §204(a)(1)(A)(vi); INA §204(a)(1)(B)(v)(I).

²⁰² Interview with Aimee Todd (Feb. 29, 2012).

²⁰³ INA §204(a)(1)(A)(iii)(II)(aa)(CC); INA §204(a)(1)(B)(ii)(II)(aa)(CC).

²⁰⁴ INA §204(a)(1)(A)(iii)(I)(bb).

²⁰⁵ INA §101 (a)(50).

²⁰⁶ INA §204(a)(1)(A)(II)(aa)(CC).

²⁰⁷ 8 C.F.R. § 204.2(c)(2)(vii).

²⁰⁸ 8 C.F.R. § 204.2(c)(2)(vii).

²⁰⁹ 8 C.F.R. § 204.2(c)(1)(ix).

²¹⁰ Interview with Lisa Hurlbutt (Mar. 14, 2012).

Divorce

A VAWA self-petitioner can only **apply before the termination of the marriage**. The only exception for filing a VAWA self-petition after divorce is when the applicant can demonstrate a **connection between the divorce and domestic violence**, and applies within two years of the divorce.²¹¹ The divorce decree is not required to demonstrate that the divorce was due to domestic violence, but rather the applicant must prove that the abuse or extreme hardship led to the divorce.²¹²

A VAWA self-petitioner can apply for divorce only after filing the self-petition application, and is not required to wait for the process to be completed and the application approved.²¹³ However, if the applicant remarries while the application is pending, it will be denied.²¹⁴ The applicant may remarry after the self-petition is approved.²¹⁵

➤ *Practice Tip: For VAWA self-petitioners, encourage clients not to file for divorce until the application is filed. Otherwise, a divorced spouse must file a VAWA self-petition within two years of the divorce, and establish a connection between the divorce and the battery or extreme cruelty.*²¹⁶

Bigamy

If the self-petitioner is not legally married to the abuser because of the **abuser's bigamy**, the applicant may still qualify if the applicant can prove that he or she **believed she was legally married** to the abuser.²¹⁷

The following forms of evidence may be used to prove this belief:

1. A marriage certificate;
2. A marriage license application;
3. Photographs of the wedding ceremony;
4. Affidavits from persons attending the wedding ceremony; and
5. An affidavit from self-petitioner supporting why she believed she legally married the abuser, and why she believed her marriage was valid.

²¹¹ INA §204(a)(1)(A)(iii)(II)(aa)(CC)(ccc); INA §204(a)(1)(B)(ii)(II)(aa)(CC)(ccc).

²¹² INA §204(a)(1)(A)(iii)(II)(aa)(CC)(ccc); INA §204(a)(1)(B)(ii)(II)(aa)(CC)(ccc).

²¹³ 8 C.F.R. § 204.2(c)(1)(ii).

²¹⁴ 8 C.F.R. § 204.2(c)(1)(ii).

²¹⁵ 8 C.F.R. § 204.2(c)(1)(ii).

²¹⁶ Interview with Lisa Hurlbutt (Mar. 14, 2012).

²¹⁷ INA § 204(a)(1)(A)(iii)(II)(aa)(BB); INA § 204(a)(1)(B)(ii)(II)(aa)(BB).

Death of the Abuser

If the self-petitioner was the spouse of an **abusive U.S. citizen** (not a permanent resident) who **died within the past two years**, the victim can still apply for a self-petition.²¹⁸

The following documents must be provided:

1. A marriage certificate;
2. A death certificate of the U.S. citizen spouse; and
3. Proof of U.S. citizenship
 - a. This may include a U.S. passport, birth certificate, or naturalization certificate

Battery and/or Extreme Cruelty

For a VAWA self-petition, the applicant must prove that he or she has been **battered** or has been the subject of **extreme cruelty** by a U.S. citizen or LPR spouse, parent, or child.²¹⁹ In spousal cases, abusive behavior must occur **during the marriage**.²²⁰ Abusive behavior is broadly defined to cover **physical, sexual, psychological, and economic coercion** behaviors.²²¹

Definitions of abuse include abusive behavior that may not appear violent, but is part of a general pattern of violence. Abuse must rise to a certain level of severity, but is not required to be physical.

No exhaustive list exists of acts that constitute “**battery or extreme cruelty**,” and the definition of such is flexible.²²² The following list provides examples of non-physical abuse that may constitute extreme cruelty:

1. Social isolation of the victim;
2. Accusations of infidelity;
3. Incessantly calling, writing or contacting her;
4. Interrogating her friends and family members;
5. Threats;
6. Economic abuse;
7. Not allowing the victim to get a job;
8. Controlling all money in the family; and/or
9. Degrading the victim²²³

If an action was deliberately used to perpetrate extreme cruelty against the victim, it may be considered abuse. The victim must show that the abusive behavior was not only abusive, but also rose to the level of extreme cruelty.

²¹⁸ INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa).

²¹⁹ INA § 204(a)(1)(A); INA § 204(a)(1)(B).

²²⁰ INA §204(a)(1)(A)(iii); INA §204(a)(1)(B)(ii).

²²¹ 8 C.F.R. § 204.2(c)(1)(vi); 8 C.F.R. §204.2(e)(vi).

²²² See [Matter of L-M-](#) (BIA, 2012) for an unpublished decision discussing extreme cruelty.

²²³ National Immigrant Justice Center, PRO BONO ATTORNEY MANUAL ON LEGAL IMMIGRATION PROTECTIONS FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, 26 (2011).

Joint Residence with Abuser

Though there is **no specified amount of time** of required cohabitation with the abuser, the applicant must live with the abuser at least for a short time. The cohabitation may have taken place inside or outside of the United States. It is also not necessary to live with abuser at the time of filing the self-petition.²²⁴

Current Residence

The applicant must prove that he or she is either:

1. Residing in the United States, or
2. If living abroad, was subjected to abuse either
 - a. By a U.S. citizen or LPR in the United States; or
 - b. By an abusive U.S. citizen or LPR who is an employee of the U.S. government or armed forces.²²⁵

Good Moral Character

Applicants who are more than 14 years old must prove that they possess **good moral character**.²²⁶ INA § 101(f) states that a person will be barred from showing good moral character if he or she:

1. Is or was a habitual drunkard;
2. Has engaged in prostitution within the last ten years before filing the application;
3. Has engaged in any other commercial vice, whether or not related to prostitution;
4. Is or was involved in smuggling people into the United States;
5. Has been convicted of, or has admitted to, committing acts of moral turpitude, other than (1) purely political crimes and (2) petty offenses or crimes committed both when the non-citizen was under 18 years of age and more than five years before applying for a visa for admission;
6. Has been convicted of two or more offenses for which the aggregate sentences of confinement were five years or more;
7. Has been convicted of, or has admitted to, violating laws relating to controlled substances, except for simple possession of 30 grams or less of marijuana;
8. Has earned income derived principally from illegal gambling;
9. Has been convicted of two or more gambling offenses;
10. Has given false testimony for the purposes of obtaining an immigration benefit;
11. Was incarcerated for an aggregate period of 180 days or more as a result of conviction; or
12. Has been convicted of an aggravated felony, as defined in INA § 101(a)(43), where the conviction was entered on or after November, 1990, except for conviction of murder, which is bar to good moral character regardless of the date of conviction.²²⁷

²²⁴INA §204(a)(1)(A); INA § 204(a)(1)(B).

²²⁵INA § 204(a)(1)(A); INA § 204(a)(1)(B).

²²⁶INA § 204(a)(1)(A); INA §204(a)(1)(B).

²²⁷ INA § 101(f); *see also* National Immigrant Justice Center, PRO BONO ATTORNEY MANUAL ON LEGAL IMMIGRATION PROTECTIONS FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, 27 (2011).

The self-petitioner must also prove “good moral character” for the last three years.

Waiver of Good Moral Character

An exception exists in **INA § 204(a)(1)(C)** for a self-petitioner who has committed an act or has a conviction listed under INA § 101(f) if:

1. The **act or conviction is waived** with respect to the self-petitioner for purposes of determining whether the self-petitioner is admissible or deportable, and
2. The Attorney General finds that the **act or conviction was connected to the abuse** suffered by the self-petitioner.²²⁸

Regulations have not yet been issued for the good moral character provision, and some questions still exist about how this exception will be interpreted. For example, it is unclear how authorities will interpret the phrase “the act or conviction is waivable with respect to the petitioner” under the inadmissibility or deportability grounds. Waivers of INA §212 inadmissibility grounds and INA §237 deportability grounds might be helpful for the purpose of determining a self-petitioner’s good moral character exception.

Admissibility

An applicant for a VAWA self-petition does not need to prove admissibility during the self-petition application process.²²⁹ The applicant, however, **must prove admissibility when applying for adjustment of status.**²³⁰ All waivers in INA §212 are available for an approved self-petition applicant who is adjusting status.

➤ *Practice Tip: Note that, in contrast to U and T visas, for self-petitioners, admissibility is determined at the adjustment phase, and normal inadmissibility grounds and special VAWA exceptions and waivers apply.*²³¹

Derivative Children

A self-petitioner may include derivative children on his or her application, but only **children under age of 21** may be included.²³² A child accompanying or following to join a principal self-petitioner may be included in the principal’s visa petition, and the child will be accorded the second preference classification and the same priority date as the principal applicant.²³³ However, if the child reaches the age of twenty-one prior to the issuance of a visa to the

²²⁸INA § 204(a)(1)(C).

²²⁹See generally INA § 204(a); 8 C.F.R. § 204.2.

²³⁰INA § 245(a).

²³¹ Interview with Gail Pendleton (Feb. 9, 2012).

²³²8 C.F.R. § 204.2(a)(4).

²³³8 C.F.R. § 204.2(a)(4).

principal alien parent, a separate petition will be required, but the original priority date will be retained if the subsequent petition is filed by the same petitioner.²³⁴

Filing the Application

The VAWA self-petition process usually consists of two steps: **filing the actual self-petition**, and **filing for adjustment of status**.²³⁵ The self-petition is filed using **Form I-360** with the Vermont Service Center.²³⁶ This form typically has a filing fee, but this fee does not apply in the case of a self-petitioner. Once the self-petition application is approved, the applicant may be eligible to adjust status, depending on the requirements laid out below. In the interim, the applicant with an approved self-petition will be granted deferred action, which is not an actual immigration status, but will prevent removal proceedings from being brought against the non-citizen. A non-citizen with an approved self-petition is also eligible for employment authorization.²³⁷

VAWA Adjustment of Status

Only certain VAWA self-petitioners may apply for adjustment of status to lawful permanent resident. Additional criteria must be met before an applicant with an approved self-petition may adjust status.

For VAWA adjustment of status, the applicant must prove that he or she:

1. Is the beneficiary of an **approved VAWA self-petition** or has a **pending VAWA self-petition** that if approved, would render the applicant eligible for adjustment of status;
2. Has an **available immigrant visa** (often referred to as a **current visa number** or **current priority date**);
3. Is **admissible**; and
4. Merits adjustment of status as an **exercise of discretion**.²³⁸

Current Visa Number

The **current visa number** refers to the availability of an immigrant visa in the family-based immigration process, and the ability of a self-petition to adjust status will depend on whether

²³⁴8 C.F.R. § 204.2(a)(4).

²³⁵For further discussion of VAWA remedies, see “Some Tips for Preparing VAWA Immigration Cases” under Carolyn Killea Resources in Appendix C and “VAWA Self-Petitioning: Some Practice Pointers” under Gail Pendleton Resources in Appendix C (lists incomplete or inaccurate C.F.R. provisions for VAWA).

²³⁶For a detailed list of material for the VAWA self-petition application, see “Required material for **VAWA Self-Petition (Spouse)** application” and “Required material for **VAWA Self-Petition (Child)** application” in Appendix A. Note that spouses of USC’s can file the I-485 along with the I-360 in a “one-step” application.

²³⁷See 8 C.F.R. § 274a.12(c)(9) (allowing employment authorization for an applicant for adjustment of status) and 8 C.F.R. § 274a.12(c)(14) (allowing employment authorization for a non-citizen who has been granted deferred action).

²³⁸INA § 245(a).

he or she is related or a U.S. citizen or an LPR.²³⁹ Immediate family members of U.S. citizens can adjust status immediately because they are not subject to the quotas in the family-based immigration system.²⁴⁰ The immediate family members of LPRs must wait until a visa is available within the petitioner's preference category, and once the corresponding priority date becomes current, the petitioner may apply to adjust status.²⁴¹

Admissibility

An applicant for adjustment of status must demonstrate that he or she is **admissible** to the United States.²⁴² **INA § 212** provides **grounds of inadmissibility**.

The following are **common grounds of inadmissibility**:

1. Entering Without Inspection
2. Criminal convictions
3. Security grounds
4. Fraud/Misrepresentation
5. False claims to U.S. citizenship, including unlawful voting and falsification of I-9 form for employment
6. Health Conditions or Substance Abuse
7. Prior Deportations
8. Public Charge
9. Unlawful presence²⁴³

A **waiver** may be available for a VAWA self-petitioner depending on the ground of inadmissibility.

➤ *Practice Tip: Send your client's fingerprints for an FBI criminal background check for a full and accurate account of all crimes committed by your client.*²⁴⁴

Filing the VAWA Adjustment of Status Application

To apply for adjustment of status, the applicant must file **Form I-485**.²⁴⁵ The applicant must also prove his or her **eligibility** for VAWA adjustment of status. Though there is no fee for the VAWA self-petition, there is a **fee for adjustment of status and for employment authorization**. The applicant can apply for a **fee waiver** for both of these forms with **Form I-912**, which must be included in the adjustment of status and employment authorization applications.

²³⁹ See "Description" section for a discussion of family-based immigration.

²⁴⁰ INA § 201(b).

²⁴¹ 8 C.F.R. § 245.1(g); current priority dates can be found on the [Visa Bulletin](#).

²⁴² INA § 245(a).

²⁴³ See INA § 212; see also National Immigrant Justice Center, PRO BONO ATTORNEY MANUAL ON IMMIGRATION RELIEF FOR CRIME VICTIMS: U VISAS, 23 (2011).

²⁴⁴ Interview with Rosa Gomez (Feb. 21, 2012); Interview with Christie Popp (Feb. 24, 2012).

²⁴⁵ For a detailed list of material for the VAWA adjustment of status application, see "Required material for **VAWA Self-Petitioner Adjustment of Status**" in Appendix A.

VAWA Cancellation of Removal

Description

VAWA Cancellation of Removal is a **defensive remedy**, unlike the affirmative applications of the U visa, T visa, and VAWA self-petition. Only immigrants in immigration court proceedings are eligible for VAWA cancellation of removal. This remedy will cancel the removal or deportation order of an applicant and grant the applicant lawful permanent residence. Cancellation of removal is also granted by an immigration judge, rather than through filing an application with the USCIS Vermont Service Center. Similar to the self-petition, cancellation of removal requires a family relationship with an abusive spouse or parent, and requires the abuser to be a U.S. citizen or LPR. **Cancellation of removal does not provide relief for derivative family members.**

Comparing VAWA Self-Petitions and VAWA Cancellation of Removal

Both the VAWA self-petition and VAWA cancellation of removal can lead to **legal permanent resident status** for the applicant; however, the eligibility requirements for VAWA cancellation of removal are more difficult than the requirements for the VAWA self-petition.

Some examples of an applicant who is eligible for cancellation of removal but not for self-petition are:

1. Parents of abused children of U.S. citizens and LPRs who are not married to the abuser are not eligible to self-petition, but may be eligible for VAWA cancellation.
2. Spouses of U.S. citizens and LPRs who were divorced more than two years ago, or whose U.S. citizen or LPR abusive spouse or parent lost status more than two years ago, are no longer eligible to self-petition, but can still apply for VAWA cancellation of removal.
3. An individual who is qualified for self-petition or who has an approved self-petition, but is placed in removal proceedings before his or her priority date becomes current may be eligible for VAWA cancellation. In this case, an approved self-petition will lend credibility to the cancellation claim, but will not permit the applicant to adjust status until the precedence date becomes current.
4. Abused sons and daughters of U.S. citizens or LPRs who do not apply for self-petition before they turn 21 no longer qualify for a self-petition, but may be eligible for VAWA cancellation.²⁴⁶

Eligibility

The following persons are **eligible** to apply for VAWA cancellation:

1. **Abused spouses** of U.S. citizens and LPRs;

²⁴⁶National Immigrant Justice Center, PRO BONO ATTORNEY MANUAL ON LEGAL IMMIGRATION PROTECTIONS FOR IMMIGRANT SURVIVORS OF DOMESTIC VIOLENCE, 32 (2011).

2. **Non-abused parents of abused children** of U.S. citizens or LPRs, even if not married to the abuser, and regardless of the child’s status; and
3. **Abused “intended spouses”** of U.S. citizens or LPRs.²⁴⁷

An applicant for VAWA cancellation of removal needs to **prove** the following items:

1. Being **abused or suffering extreme cruelty**;²⁴⁸
2. Being **physically present** in the United States for three years before applying;²⁴⁹
3. **Extreme hardship** on the part of the applicant, his or her child, or his or her parent if the applicant were removed from the United States;²⁵⁰
4. **Good moral character** during the period of required physical presence;²⁵¹ and
5. **Not inadmissible** for criminal or security and related grounds, **not deportable** for marriage fraud, failure to register and falsification of documents, or security and terrorism grounds; and **not convicted of an aggravated felony**.²⁵²

No Derivative Family Members

VAWA cancellation of removal does not offer any “**derivative beneficiaries**.” Thus, children are not automatically granted the cancellation of removal with their parents and a parent will not be granted cancellation of removal with their abused children. However, the parent who is granted cancellation of removal may file a **second-preference petition** for the child as an LPR parent.²⁵³ However, a child who is granted cancellation of removal cannot apply for his or her parent until the child is 21 and a U.S. citizen.²⁵⁴ In either case, **parole will be granted** to the child or parent of a non-citizen granted VAWA cancellation of removal.²⁵⁵ This grant of parole will last until the adjudication of the parolee’s adjustment of status application.²⁵⁶

Filing for VAWA Cancellation of Removal

To apply for VAWA cancellation of removal, the non-citizen must file **Form EOIR 42B** and the required supporting documents.²⁵⁷ A grant of cancellation of removal by an immigration judge will **end the removal proceedings** against the immigrant, and he or she will be **granted lawful permanent residence**.²⁵⁸

²⁴⁷INA § 240A(b)(2)(A)(i).

²⁴⁸INA § 240A(b)(2)(A)(i); see [Matter of L-M-](#) (BIA, 2012) for an unpublished decision discussing extreme cruelty.

²⁴⁹INA § 240A(b)(2)(A)(ii).

²⁵⁰INA § 240A(b)(2)(A)(v).

²⁵¹INA § 240A(b)(2)(A)(iii).

²⁵²INA § 240A(b)(2)(A)(iv).

²⁵³ See “[Family-based Immigrant Visas](#)” at the Department of State and “[Family](#)” at USCIS for more information regarding family-based immigration.

²⁵⁴INA §203(a).

²⁵⁵INA § 240A(b)(4).

²⁵⁶INA § 240A(b)(4).

²⁵⁷For a detailed list of material for the VAWA cancellation application, see “Required material for **VAWA Cancellation of Removal** application” in Appendix A.

²⁵⁸INA § 240A(b)(2)(A).

Prosecutorial Discretion

Description

Prosecutorial Discretion is the discretion of the agency to determine whether and to what extent it will enforce the law. When the agency decides not to enforce the law against an individual, this is referred to as a favorable exercise of prosecutorial discretion.

Within the immigration context, prosecutorial discretion is premised on both **monetary grounds** (DHS has a limited number of resources and as a practical matter, cannot deport 12 million undocumented immigrants) and **humanitarian grounds** (many individuals who present positive or humanitarian equities are statutorily ineligible for remedies such as VAWA Cancellation, and in the absence of adverse factors are considered “**low priorities.**”).²⁵⁹ Prosecutorial discretion provides an important option for domestic violence victims who may be ineligible for a particular immigration remedy, but nonetheless present important or compelling equities.²⁶⁰

➤ *Practice Tip: Note that the attitude of local ICE may not always be consistent with the official policies of national ICE.*²⁶¹

General Factors

In the last year, Immigration and Customs Enforcement (ICE, the prosecutorial arm of DHS) has issued a number of guidance documents about its enforcement priorities and prosecutorial discretion.²⁶² The June 17, 2011, memorandum, “**Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens,**” (Morton Memo 1) broadly states the goals of prosecutorial discretion and the general factors relied upon to make determinations. These factors include, but are not limited to:

1. The agency's civil immigration enforcement priorities;
2. The person's length of presence in the United States, with particular consideration given to presence while in lawful status;
3. The circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;

²⁵⁹Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, 2 (June 17, 2011).

²⁶⁰For further discussion of prosecutorial discretion, see “AILA Prosecutorial Discretion Toolkit” and “DHS Review of Low Priority Cases for Prosecutorial Discretion” under Other Resources in Appendix C.

²⁶¹Interview with Gail Pendleton (Feb. 9, 2012).

²⁶²See Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011); Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).

4. The person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
5. Whether the person, or the person's immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
6. The person's criminal history, including arrests, prior convictions, or outstanding arrest warrants;
7. The person's immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
8. Whether the person poses a national security or public safety concern;
9. The person's ties and contributions to the community, including family relationships;
10. The person's ties to the home country and condition in the country;
11. The person's age, with particular consideration given to minors and the elderly;
12. Whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
13. Whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
14. Whether the person or the person's spouse is pregnant or nursing;
15. Whether the person or the person's spouse suffers from severe mental or physical illness;
16. Whether the person's nationality renders removal unlikely;
17. Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
18. Whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
19. Whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.²⁶³

In determining to exercise prosecutorial discretion, ICE officers, agents, and attorneys consider all relevant factors, and make determinations on a **case-by-case basis**. The decision is made based on a **totality of the circumstances**, with the goal of conforming to ICE enforcement priorities, and **no single factor will be determinative**.

Factors Warranting “Particular Care”

The June 17, 2011, memorandum, “**Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs,**” (**Morton Memo 2**) details the more specific considerations that will affect domestic violence victims. This memo states that specifically “Absent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime. In practice, the vast majority of state and local law enforcement agencies do not generally arrest victims or witnesses of crime as part of an investigation.”²⁶⁴ The policy serves the purpose of aiding

²⁶³Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, 4 (June 17, 2011).

²⁶⁴Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, 1 (June 17, 2011).

law enforcement by **minimizing the effect of immigration enforcement on a victim** or witness's willingness to call the police and aid in investigations.²⁶⁵

Together, the Morton Memoranda elucidate the following **positive factors** that prompt **particular care and consideration by ICE** officers, attorneys, and agents:

1. Veterans and members of the U.S. armed forces;
2. Long-time lawful permanent residents;
3. Minors and elderly individuals;
4. Individuals present in the United States since childhood;
5. Pregnant or nursing women;
6. Individuals who suffer from a serious mental or physical disability;
7. Individuals with serious health conditions;
8. **Victims of domestic violence, human trafficking, or other serious crimes;**
9. Witnesses involved in pending criminal investigations or prosecutions;
10. Plaintiffs in non-frivolous lawsuits regarding civil rights or liberties violations; and
11. Individuals engaging in a protected activity related to civil or other rights who may be in a non-frivolous dispute with an employer, landlord, or contractor.²⁶⁶

Forms of Possible Discretion

Prosecutorial discretion can apply to a **broad range of discretionary enforcement decisions**, including but not limited to the following:

1. Deciding to issue or cancel a notice of detainer;
2. Deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
3. Focusing enforcement resources on particular administrative violations or conduct;
4. Deciding whom to stop, question, or arrest for an administrative violation;
5. Deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
6. Seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;
7. Settling or dismissing a proceeding;
8. Granting deferred action, granting parole, or staying a final order of removal;
9. Agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
10. Pursuing an appeal;
11. Executing a removal order; and
12. Responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.²⁶⁷

²⁶⁵Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, 1 (June 17, 2011).

²⁶⁶Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, 5 (June 17, 2011); Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs, 2 (June 17, 2011).

²⁶⁷Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, 2-3 (June 17, 2011).

Limitations of Relief

1. A favorable exercise of prosecutorial discretion **does not confer legal immigration status** on your client. It also does not prevent ICE from initiating removal proceedings if circumstances change.
2. A favorable exercise of prosecutorial discretion **does not always lead to work authorization.**

➤ *Practice Tip: Beware of the “perfect victim” fallacy, or the misconception that prosecutorial discretion should only be granted to victims with a perfect background, and that the non-citizen is not actually a victim if there is anything negative in his or her record, such as a criminal history, immigration violations, etc.*²⁶⁸

Advocating for Prosecutorial Discretion

Though a formal application process for a favorable exercise of prosecutorial discretion does not exist, an attorney can advocate for such discretion to be exercised in the following ways:

1. **Ask that favorable prosecutorial discretion be exercised in your client’s case.**
 - a. If the factors of your client’s case seem favorable, request a specific action (e.g., granting a stay of removal, dismissing a proceeding, etc.), rather than simply asking that prosecutorial discretion be exercised. Outline how such a grant would be appropriate and in furtherance of enforcement priorities by highlighting the positive factors in your client’s case.
2. **Put together a package of materials to support your request for prosecutorial discretion.**
 - a. Make the request in writing, and consider providing a detailed cover letter that explains why your client deserves a favorable exercise of prosecutorial discretion. Also provide the necessary supporting materials and evidence to help the decision-making process.
3. **Use the agency memoranda to support your request.**
 - a. Provide the appropriate authority to encourage the officer to act favorably, even though these decisions are not mandatory
4. **Highlight the positive factors in your client’s case.**
 - a. Bring attention to the positive criteria in the applicable memos that apply to your client. Be sure to emphasize that your client falls into a classification that deserves “particular care.”
5. **Address any problems or inadequacies in the case or the evidence.**
 - a. Appearing to be hide information can undercut the credibility of your client’s case. Try to provide mitigating information when disclosing the negative information.
6. **Consider seeking a continuance of the proceedings if removal proceedings have been initiated.**
 - a. The immigration judge may be inclined to continue proceedings to allow you to discuss prosecutorial discretion options with ICE counsel.

²⁶⁸ Interview with Gail Pendleton (Feb. 9, 2012); Interview with Sameera Hafiz (Mar. 14, 2012).

7. **Ensure that all details of any plan for favorable action for your client are completely worked out and are committed to writing.**
8. **Seek reconsideration if you are denied a favorable exercise of prosecutorial discretion.**
 - a. Though there is no formal process of appeal, internal supervisory channels can be utilized to seek an appeal or reconsideration informally.²⁶⁹

If you are interested in reviewing the Appendices, you may contact the Center for Immigrants' Rights at Penn State's Dickinson School of Law: centerforimmigrantsr@law.psu.edu.

²⁶⁹See Mary Kenney, PROSECUTORIAL DISCRETION: HOW TO ADVOCATE FOR YOUR CLIENT, (American Immigration Council, Legal Action Center) (2011).