



ALBANY LAW SCHOOL

CENTER FOR CONTINUING LEGAL EDUCATION

Immigration Issues in Family Court

February 4, 2020

80 NEW SCOTLAND AVENUE
ALBANY, NEW YORK 12208-3494
TEL: 518-472-5888 FAX: 518-445-2303
WWW.ALBANYLAW.EDU/CLE

Immigration Issues in Family Court

February 4, 2020

Agenda

- | | |
|-----------------|--|
| 2:30pm – 3:00pm | Registration |
| 3:00pm – 3:10pm | Introduction
Jaya Connors, Esq. |
| 3:10pm – 3:40pm | Immigration Basics
Evelyn Kinnah, Esq. |
| 3:40pm – 4:10pm | Forms of Immigration Relief and Family Court Evidence
Mary Armistead, Esq. |
| 4:10pm – 4:20pm | Break |
| 4:20pm – 4:45pm | Ethical Issues in Family Court
Evelyn Kinnah, Esq.
Mary Armistead, Esq. |
| 4:45pm – 5:15pm | Mock First Appearance
Honorable Richard Rivera, Presiding
Jaya Connors, Esq., Moderating
Mary Armistead, Esq., for Petitioner-Respondent
Lisa Mendel, Esq., Attorney for the Child
Patricia Rodriguez, Esq., for Respondent-Petitioner
Marien Levy, Esq., Petitioner-Respondent
Roman Vidal, Respondent-Petitioner |
| 5:15pm – 5:30pm | Questions and Answers |

Immigration Issues in Family Courts

February 4, 2020

PRESENTER BIOGRAPHIES

JAYA LAKSHMI CONNORS, ESQ.

Visiting Assistant Professor of Law Jaya Lakshmi Connors is the Director of Albany Law School's Family Violence Litigation Clinic, a course in which second and third year law students provide legal representation to child and adult victims of intimate partner/family violence in Family Court proceedings. Prior to this position, she was the Deputy Director of the Appellate Division, Third Judicial Department's Office of Attorneys for Children, where she assisted in the administration of the Attorney for Child Program and provided ongoing legal education to over 500 attorneys for children in the Third Judicial Department. Professor Connors began her career as a Legal Services Attorney, where as a Supervising Attorney, she provided legal assistance to parenting, pregnant, and "at risk" minors. She was a former Clinical Instructor at Albany Law School's Domestic Violence Clinic, where she supervised students who represented incarcerated battered women in clemency, parole and CPL § 440.10 matters, seeking to vacate murder convictions of battered women who had killed their abusers. Professor Connors was also in private practice for many years and an attorney for the child for over ten years. She is a former Legal Director of the Capital District Women's Bar Association's, The Legal Project. Professor Connors is a recipient of the Reginald Heber Smith Fellowship Award.

EVELYN KINNAH, ESQ.

Evelyn Kinnah is the Director at the Regional Immigration Assistance Center for Region 3 in New York State. She provides legal advice and training to court-mandated attorneys representing noncitizen clients in criminal and family court regarding immigration consequences of those proceedings. Region 3 covers a fourteen-county region of New York State. Evelyn is a graduate of Cornell Law School and also holds a Master's in Public Administration from Cornell Institute for Public Affairs at Cornell University. Evelyn is admitted in New York.

MARY E. ARMISTEAD, ESQ.

Mary Armistead is an Equal Justice Works Crime Victims Justice Corps Fellow at the Legal Project. She works with victims of human trafficking, both labor and sex, by providing direct representation in a variety of civil legal proceedings, including immigration and family court, and by working on capacity-building, education, and policy issues regarding human trafficking. Mary also teaches Immigration Law as an Adjunct Professor of Law at her alma mater, Albany Law School, where she graduated summa cum laude. Mary held a clerkship at the New York State Court of Appeals for one year before working as the Staff Attorney of the Immigration Law

Clinic at Albany Law School for three years. As Staff Attorney, Mary both supervised students and maintained a personal docket in providing legal advocacy services and direct representation to detained and non-detained immigrants eligible for humanitarian immigration relief. Her expertise played a critical role in developing law students' ability to provide legal advocacy services and direct representation to clients seeking U.S. immigration status. She also developed the Special Immigrant Juvenile Pro Bono Attorney panel, wherein she connects clients to and supervises attorneys in providing pro bono representation to vulnerable immigrant children.

HONORABLE RICHARD RIVERA

Acting Supreme Court Justice, 3rd J.D.; Supervising Judge D.V. & Mentor Courts, 3rd J.D.; Presiding Judge, Domestic Violence Part, Albany Family Court; Presiding Judge, Youth Part, Albany County Court

Judge Richard Rivera is a graduate of Colgate University and Albany Law School. His legal career began as an associate counsel for the Law Office of Gaspar M. Castillo, Esq., where he represented litigants in local city and town courts, handling criminal matters, traffic violations and appeals. It wasn't until he became staff counsel for the Albany Law School, Family Violence Clinic that his career in Family Court began. As staff counsel, Judge Rivera represented victims of domestic violence with all matters pertaining to orders of protection, custody, and support. Judge Rivera also served as an Attorney for Children in both Albany and Rensselaer counties; Assistant Conflict Defender representing litigants in family and criminal courts; Assistant County Attorney, prosecuting Juvenile Delinquents and PINS and as a Support Magistrate.

In November 2014, Judge Rivera was elected to a 10-year term in Albany County Family Court. Since taking the bench, Judge Rivera has presided over all matters and even conducted his first wedding ceremony completely in Spanish. As of February 27, 2017, Judge Rivera was appointed to preside over the newly created Domestic Violence Part at the Albany County Family Court. Judge Rivera presides over the Albany County Youth Part since its creation pursuant to the Raise the Age legislation.

Effective January 1, 2019 Judge Rivera was designated Acting Supreme Court Justice for the 3rd Judicial District and was named as the first supervising judge for domestic violence courts and mentor courts in the district.

Judge Rivera is a member of the New York State Bar Association, Albany County Bar Association, the Capital District Black and Hispanic Bar Association, the Puerto Rican Bar Association, the Hispanic National Bar Association, the Latino Judges Association and the New York State Family Court Judges Association. He is also a member of the Franklin H. Williams Judicial Commission, which was established to develop programs to improve the perception of fairness within the court system and to ensure equal justice in New York State. In 2019, Judge Rivera was appointed to the Board of Directors of the National Consortium on Racial & Ethnic Fairness in the Courts.

LISA MENDEL, ESQ.

Lisa Mendel is an associate at Meyers & Meyers, LLP where she has worked as an immigration defense attorney since 2014, focusing her practice on Asylum, Withholding of Removal and protection under the Convention Against Torture, Special Immigrant Juvenile Status, and removal defense, including appeals to the Board of Immigration Appeals and Federal Courts. She is an adjunct professor of Law at Albany Law School and is currently teaching U.S. Refugee and Asylum Law. She taught asylum law for the New York Immigration Coalition on a Pro Bono basis in 2017 and 2018. She is a volunteer attorney for the Safe Passage Project at New York Law School and the 2016 Recipient of the Kurt Clobridge Memorial Award for Pro Bono Service from The Legal Project. She was on the panel for Attorneys for Children for Albany Family Court for two years. She is a graduate of Brown University, where she graduated with a Bachelors degree in Social Anthropology with honors, and Suffolk University Law School, where she graduated cum laude. She is proficient in Spanish.

PATRICIA R. RODRIGUEZ, ESQ.

Pat Rodriguez is a solo practitioner in Schenectady, New York who practices primarily in Family Court and Supreme Court. She is an Attorney for Children in Schenectady, Albany and Montgomery Counties. Attorney Rodriguez also serves as an impartial hearing officer for the New York State Education Department. She is a 1979 graduate of Douglass College of Rutgers University and earned her law degree from the University of Wisconsin Law School in 1985 and received a Legal Education Opportunities Fellowship. Attorney Rodriguez was the president of the Capital District Black and Hispanic Bar Association from 2015 to 2017 after having previously served as vice president and board member, and president of the Schenectady County Bar Association from 2017 to 2019 after having previously served as vice president. Pat formerly served on the NYSBA House of Delegates and the Executive Committee of the New York State Bar Association. She previously co-chaired the Special Committee on Youth Courts with the late Honorable Judith S. Kaye. Pat is also on the board of directors of the Legal Aid Society of Northeastern New York.

Prior to entering into private practice, Rodriguez served as Assistant Counsel to the New York State Education Department. Her past experience includes working as General Counsel for the New York State Consumer Protection Board and Associate Counsel for the New York State Assembly.

She has also served as the Vice President of To Life!, Vice President of the Law Order and Justice Center (currently known as the Center for Community Justice (CCJ)), and was on the board of directors of Environmental Advocates. She is also a member of the Capital District Women's Bar Association. Pat is of Mexican-American descent and is fluent in Spanish.

MARIEN A. LEVY, ESQ.

Marien Levy is a staff attorney at the Legal Project. She has been an immigration attorney since 2014, previously working at Legal Aid Society of Northeastern New York. She has represented clients in a variety of immigration matters, including citizenship applications, family-based petitions, Violence Against Women Act applications, and U Nonimmigrant applications. She is a graduate of Haverford College and of William & Mary Law School. She speaks Spanish. She likes to cook, to eat, and to read about food.

ROMAN A. VIDAL GUZMAN

A native of Mexico and member of the Triqui indigenous group, Roman A. Vidal Guzman is an Immigration Program Specialist and DOJ Accredited Representative for The Legal Project, Inc. He represents individuals who are unable to afford private attorneys' fees in front of USCIS and USICE in a wide array of applications. Also, he organizes pro bono consultations with private attorneys for selected cases. Additionally, he helps coordinate efforts with other regional nonprofits and private stakeholders to better serve the needs of the immigrant community at the local and state level. Prior to coming to The Legal Project, Roman was employed as Program and Office Coordinator at Literacy New York Greater Capital Region. Outside his job, he is a board member of New Leaders Council - Capital District, a national leadership training institute for progressive political entrepreneurs that includes elected officials and civically-engaged leaders in business and government.

He graduated from Union College with a Bachelor of Arts in Political Science. An avid soccer fan, Roman likes to follow international news and to play the guitar.

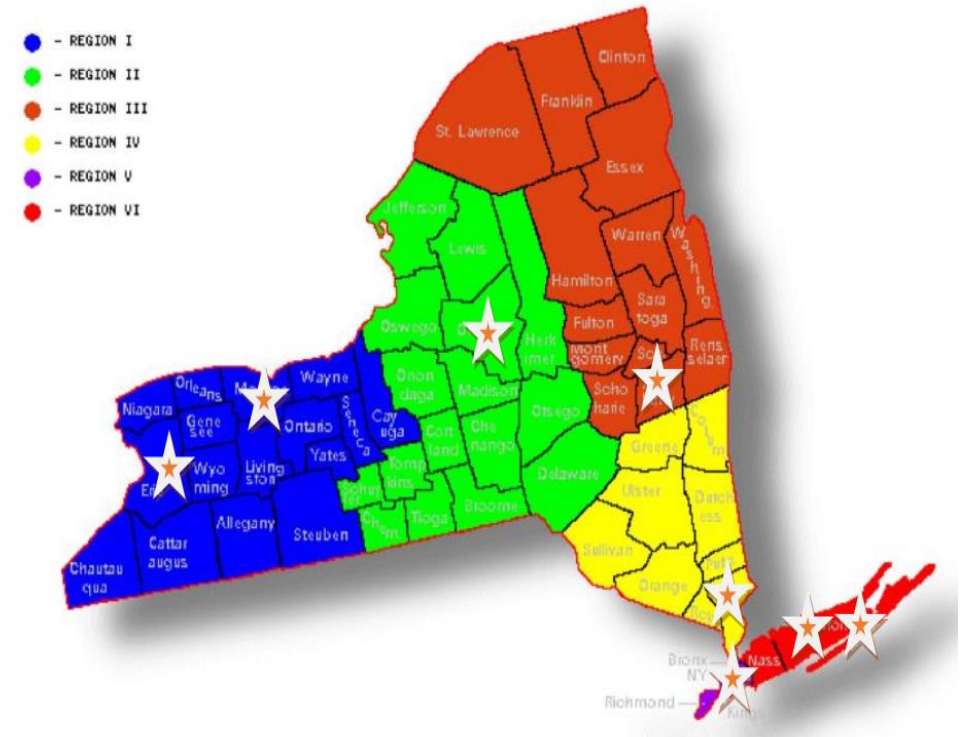
THE INTERSECTION OF IMMIGRATION AND FAMILY LAW IN NEW YORK

Evelyn Kinnah, Esq.
Albany County Immigration Assistance Center
Regional Immigration Assistance Center 3 (Capital Region and
Northern New York)
evelyn.kinnah@albanycountyny.gov
518.447.5539

MISSION

- Provide Legal Assistance and Support
- Provide Continuing Legal Education and other Trainings
- Development of Immigration Service Plans, Protocol and Procedures
- Encourage Collaboration
- Compliance with ILS standards

REGIONAL IMMIGRATION ASSISTANCE CENTERS



IMMIGRATION & FAMILY LAW

PADILLA V. KENTUCKY

The Sixth Amendment to the United States Constitution requires defense counsel to provide affirmative and competent advice to a noncitizen defendant regarding the immigration consequences of a guilty plea.

Absent such advice, a noncitizen may raise an Ineffective Assistance of Counsel claim.

“[D]eportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.”
130 S.Ct. 1473, 1480 (2010)

IMMIGRATION & FAMILY LAW

WHO IS SUBJECT TO
REMOVAL?



ANYONE WHO IS
NOT A U.S. CITIZEN

IMMIGRATION & FAMILY LAW

WHO CAN BE REMOVED?

Lawful Permanent Resident

- **Admitted** to the U.S. as a green card holder

Refugee or Asylee

- Granted refugee status outside of the U.S. or asylum status from within the U.S.

Nonimmigrant

- **Admitted** to the U.S. on a temporary basis
- (i.e., to visit, attend school, work, etc.)

Humanitarian Relief

- Granted temporary protection within the U.S. (i.e., TPS, DACA, T, U or S visa, etc.)

Undocumented

- Entered the United States illegally
- (i.e., without being inspected and admitted)

IMMIGRATION & FAMILY LAW

DOES PADILLA APPLY IN FAMILY COURT?

- No case law squarely addresses whether Padilla could apply in a civil proceeding.
- NY Position:
 - Immigration consequences similarly ‘enmeshed’ in the family court system.
 - Therefore, same resources and tools available to counsel in criminal court will be made available to counsel handling family court proceedings through the six (6) RIACs.
- Professional Standards:
 - Model Rules of Professional conduct
 - Rule 1.1 (Competence), and Rule 1.4 (Communication to facilitate informed decisions)

IMPACTED POPULATION

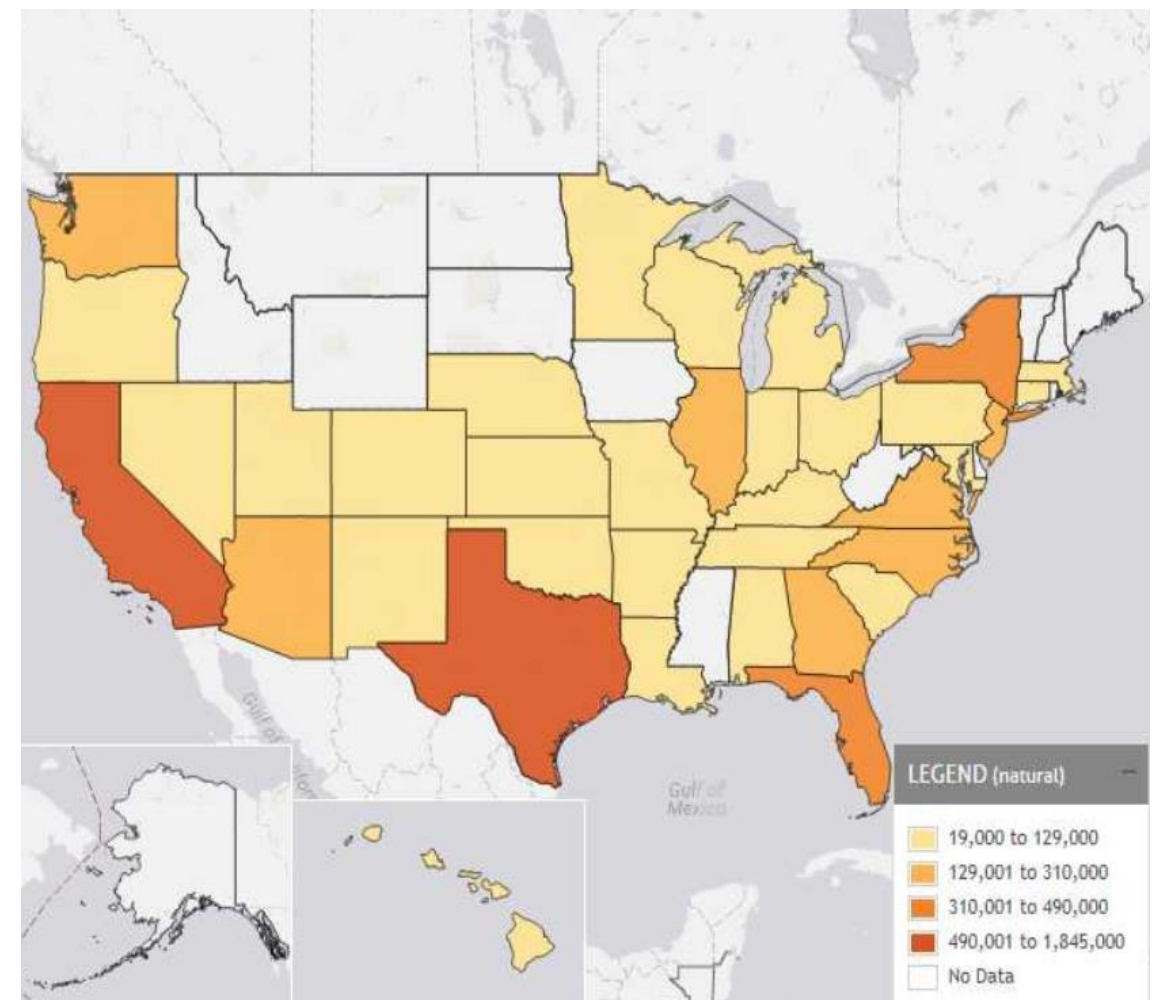
Of the 70 million children under age 18 in the United States, 26% (18.2 million) live with at least one immigrant parent ([Migration Policy Institute, Children in U.S. Immigrant Families](#))

- Nearly 16 million of these children were born in the U.S.
- More than 5 million children in the U.S. have at least one undocumented parent
 - 79% are U.S. citizens
 - 19% are undocumented
 - 2% are lawfully present non-citizens

[Migration Policy Institute, Children in U.S. Immigrant Families \(2016 Statistics\)](#)

In 2014, it was estimated that over 2,000,000/19.75 million are reported non-citizens residing in New York State.

(www.migrationpolicy.org)



CHILDREN IN IMMIGRANT FAMILIES IN WHICH RESIDENT PARENTS ARE NOT U.S. CITIZENS (NUMBER) - 2014

National KIDS COUNT

KIDS COUNT Data Center, datacenter.kidscount.org

A project of the Annie E. Casey Foundation

IMMIGRATION & FAMILY LAW

PROCEEDINGS

- ❖ Abuse and Neglect
- ❖ Family Offenses
- ❖ Support
- ❖ Custody

TRIGGERS

- ❖ Violation of Orders of Protection
- ❖ Findings
- ❖ Admissions
- ❖ Contempt + Jail

IMMIGRATION CONSEQUENCE

- ❖ Inadmissibility
- ❖ Deportability
- ❖ Detainer/notification
- ❖ Denial of Immigration Benefit or Relief

IMMIGRATION & FAMILY LAW

Triggers and possible immigration consequence

	Deportability	Inadmissibility	Denial of Benefits or Relief	Detainer/ notification
Violation of Order of Protection	★	★	★	★
Findings or admissions on the record		★	★	
Contempt + Jail			★	★

ABUSE, NEGLECT AND ABANDONMENT & TERMINATION OF PARENTAL RIGHTS

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FAMILY COURT FINDINGS/ADMISSIONS

- A Family Court Finding is not a “conviction” for immigration purposes.

- Conviction for immigration purposes:

FORMAL JUDGMENT OF GUILT entered by a court; OR,

IF ADJUDICATION HAS BEEN WITHHELD, where a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.

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What are the immigration consequences of a finding?

DENIAL OF IMMIGRATION BENEFIT/RELIEF

- A finding may be treated as an admission to “unlawful act,” bar to GMC requirement for naturalization.
- A finding may be treated as discretionary grounds for denial of other benefits and relief requiring Good Moral Character.

INADMISSIBILITY

- A finding may be treated as an admission to one or more grounds of inadmissibility.
 - ◆ Possible CIMT (endangering welfare of a child, sexual abuse, forcible touching)
 - ◆ Conduct-Based (prostitution, reason to believe drug trafficker)

IMMIGRATION & FAMILY LAW

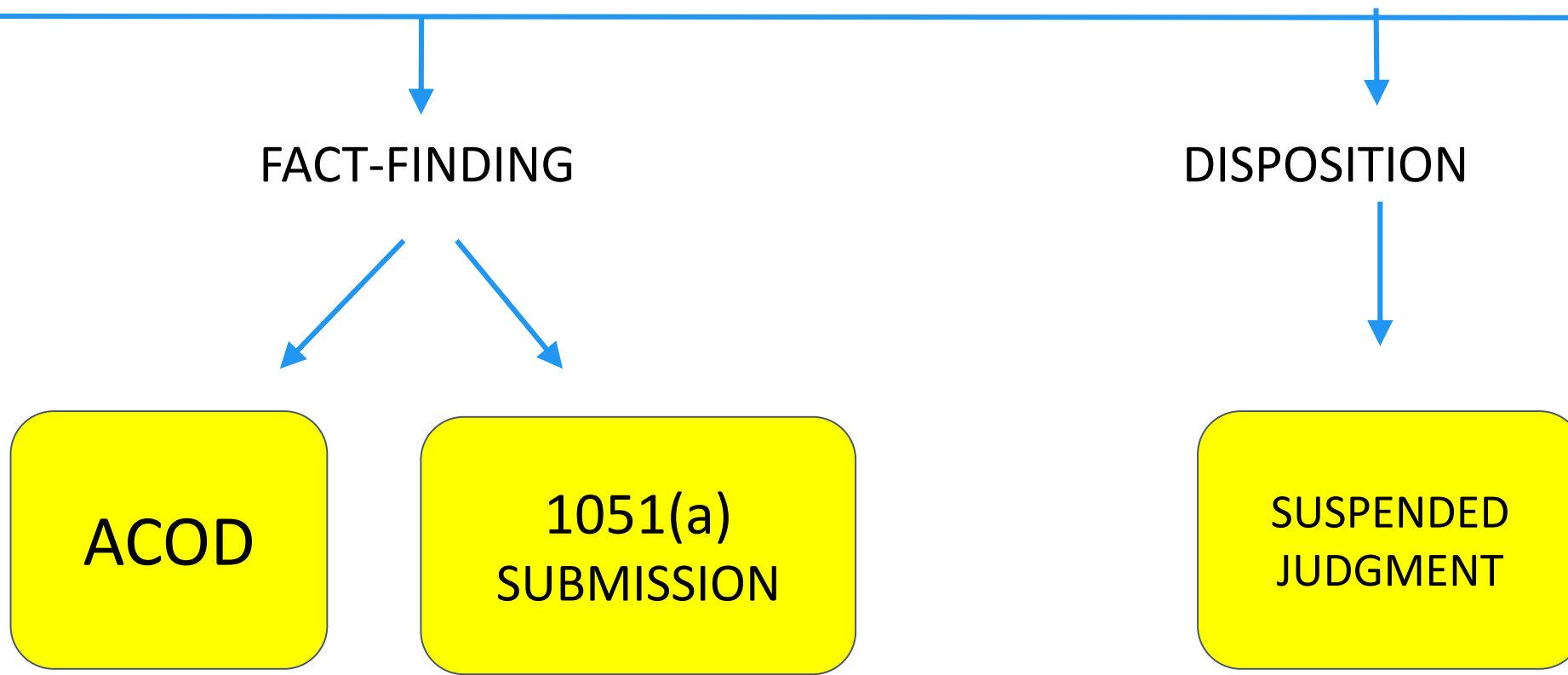
Immigration issues are also triggered by admissions in Family Court proceedings.

*...and alien convicted of, or who **admits having committed** or who **admits committing acts which constitute the essential elements** of a crime involving moral turpitude...is inadmissible.*

INA 212(a)(2)(A)(i)(I)

IMMIGRATION & FAMILY LAW

How can a noncitizen mitigate the impact of a finding?



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Family Treatment Court

- Respondent must make an upfront admission to drug use. Admissions are detailed and include information such as drugs of choice and frequency of use.
- Participants also sign a Treatment Court contract and agree to abide by a Treatment Plan. This will include random drug testing and rehabilitation services.
- Failure to abide by the plan or to appear in Court can result in warrant and/or contempt finding.

Immigration Consequences:

- Admission to drug abuse or drug addiction can render any non-citizen deportable and permanently ineligible for a green card and other benefits.
- If immigration authorities have “reason to believe” the person is a “drug trafficker” they can also permanently ban the person from getting a green card and other benefits.

IMMIGRATION & FAMILY LAW

Termination of Parental Rights

Consequences for Parents

Parent(s) can never obtain an immigration benefit through the child.

The finding could factor into discretionary denial of immigration benefit or relief for parent(s).

Consequences for child

Parent(s) cannot petition for immigration benefits for the child.

Could deprive child of path to citizenship.

EXCEPTION possible:

If a parent in immigration detention maintains a meaningful role in their child's life, N.Y. Soc. Serv. Law § 384-b allows for an exception to the requirement that ACS file a TPR petition when a child has been in foster care for 15 out of the past 22 months.

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Detained Parents/Legal Guardians Directive

Provides guidance to DHS Enforcement Removal Officers (EROs) and ICE detention facilities on the detention and removal of alien parents/legal guardians of a minor child(ren), who has a direct interest in a family/child welfare proceeding in the U.S. as to:

- Immigration Detention Placement and Transfer Decisions
- Facilitating Participation in Family/Child Welfare Proceedings
- Parent-Child Visitation
- Coordinating the Care and/or Travel of a Child

Detention and Removal of Alien Parents or Legal Guardians, Policy Number 11064.2 (Aug. 29, 2017)

Available at ice.gov/parental-interest

IMMIGRATION & FAMILY LAW

PARENTAL INTEREST DIRECTIVE (2013)

- Permitted return of Parents/Legal Guardians to US for family/child welfare proceedings
- Allowed for use of “prosecutorial discretion” by DHS
- Allowed for proximate detention of parent/legal guardian to family/child welfare proceeding
- Provided guidance on how to allow for parent/legal guardian participation in family/child welfare proceeding (i.e., including court-ordered visitation)

DETAINED PARENTS/LEGAL GUARDIANS DIRECTIVE (2017)

- Deleted language to facilitate a parent’s/legal guardian’s return to the US (i.e., but still includes language on “parole” into the US)
- Deleted reference to “prosecutorial discretion”
- Providing limited direction on proximity of detention of parent/legal guardian to family/child welfare proceeding
- Included language on parent/child visitation and added a section addressing “minor children”

For More Information, visit the [Women's Refugee Commission FAQ on ICE Directive](#)

FAMILY OFFENSES

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- ❖ Article 8 courts have concurrent jurisdiction with the Criminal Courts over “family offenses.”
- ❖ Many family offenses will be considered a crime involving moral turpitude or a crime of domestic violence

- Disorderly Conduct, 240.20 (if not in public);
- Harassment, 240.25, 240.26, 240.30;
- Stalking, 120.60, 120.55, 120.50, 120.45;
- Criminal Mischief, 145.00;
- Menacing, 120.14, 120.15;
- Reckless Endangerment, 120.20, 120.25;
- Assault, 120.05, 120.00
- Attempted Assault, 110/120.00;
- Sexual Misconduct, 130.20;
- Forcible Touching, 130.52;
- Sexual Abuse, 130.60, 130.55;
- Strangulation, 121.13, 121.12;
- Criminal Obstruction of Breathing or Blood Circulation, 121.11;
- Identity Theft, 190.78, 190.79, 190.80;
- Grand Larceny, 155.30, 155.35;
- Coercion, 135.60(1), (2) or (3).

IMMIGRATION & FAMILY LAW

“Any alien who is ... **convicted** of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable.”

INA §237(a)(2)E(i)p; 8 U.S.C. §1227(a)(2)(E)(i)

IMMIGRATION & FAMILY LAW

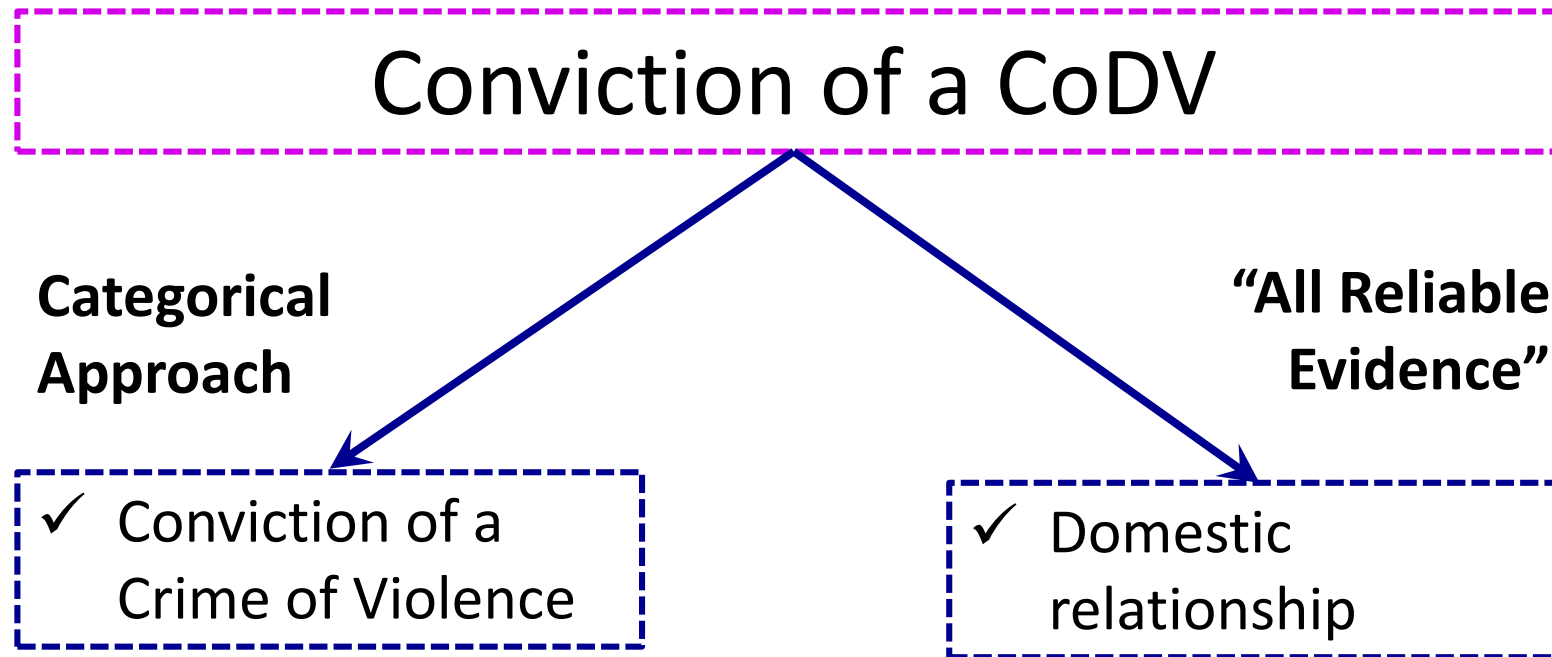
Crime of Violence

- (a) an offense that has an element the use, attempted use, or threatened use of physical force against the person or property of another; or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or another may be used in the course of committing the offense. 18 USC Section § 16(a), (b)

Crime of Domestic Violence

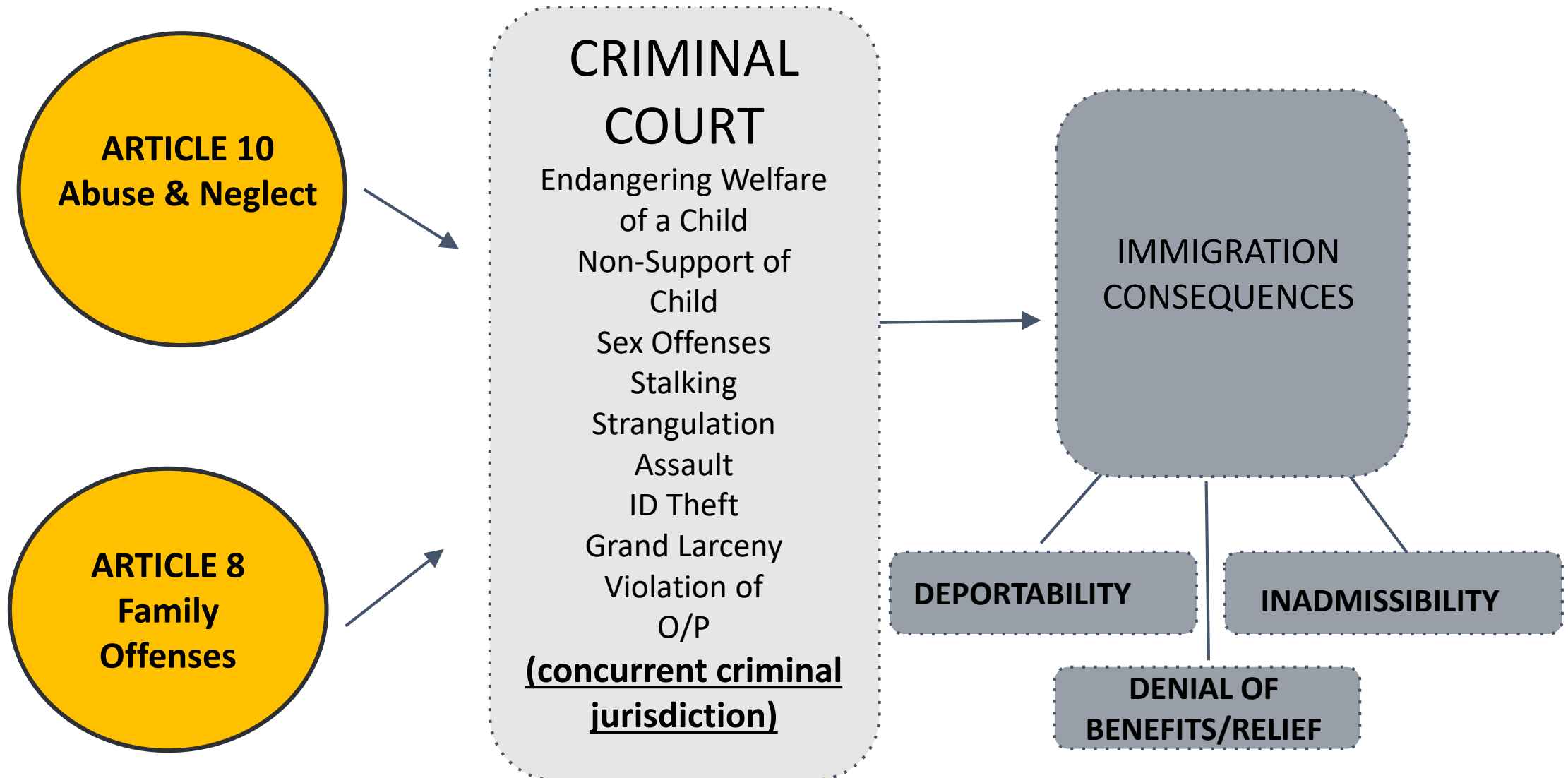
...any **crime of violence** (as defined in [18 USC 16]) against a person committed by a **current or former spouse** of the person, by an individual **cohabitating** with or has cohabitated with the person as a spouse, by a person **similarly situated to a spouse**...or by any other individual **...protected ... under the domestic of family violence laws of ...any State**...or unit of local government.

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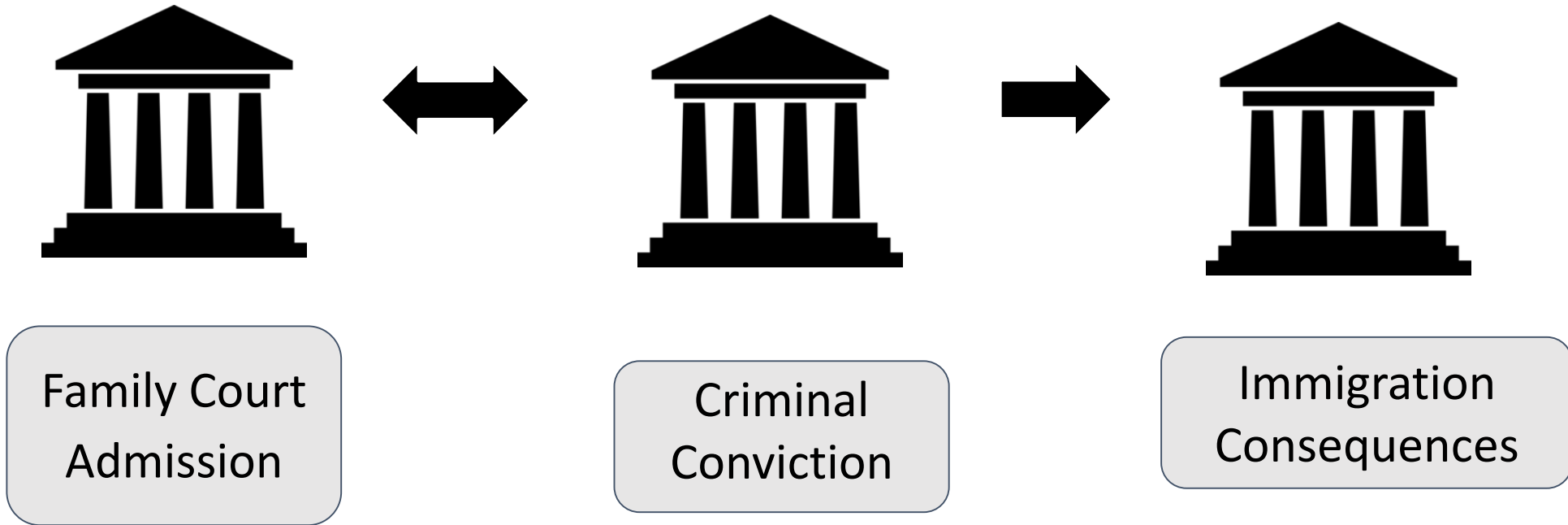


See Matter of Estrada, 26 I&N Dec. 749 (BIA 2016) (circumstance-specific approach is used to determine the domestic nature of the conviction)

IMMIGRATION & FAMILY LAW

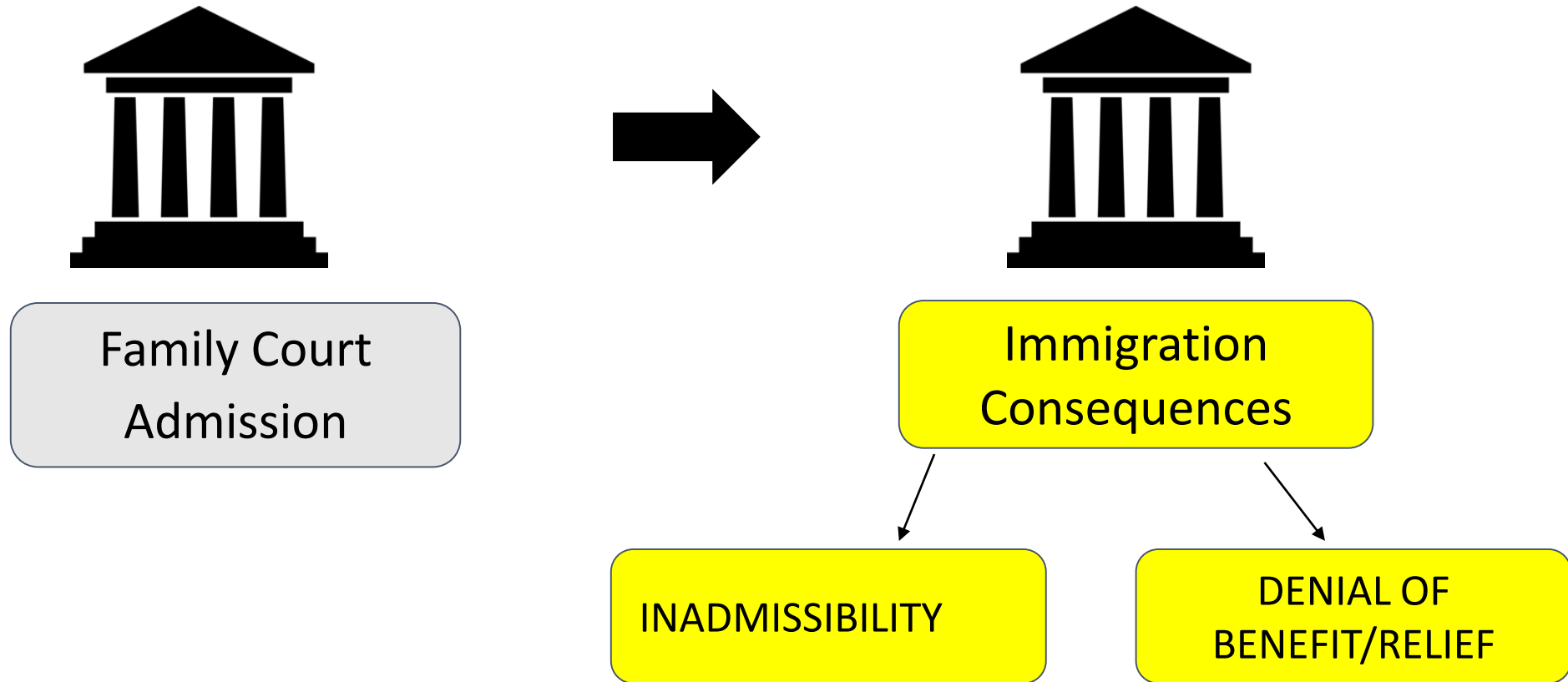


IMMIGRATION & FAMILY LAW



When there are **concurrent** cases in family and criminal courts that stem from the same allegations, and a non-citizen is involved, concerns about admissions are **HEIGHTENED**.

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Even without a concurrent case, an “admission” to a family offense may trigger ground of inadmissibility or serve as grounds for denying a benefit or relief.

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CRIMES AGAINST A CHILD

Includes offenses that are intentional, knowing, reckless and criminally negligent or involve an omission that constitutes maltreatment of a child under the age of 18 or impairs a child's physical/mental well-being

Example: Endangering the welfare of a child NY Penal Law §260.10(1)

A conviction under NY Penal Law §260.10(1) is categorically a "crime against a child."

Florez v. Holder, 779 F.3d 207 (2d Cir. 2015)

No proof of injury to child is required. *Matter of Soram*, 25 I. & N. Dec. at 381, 383

IMMIGRATION & FAMILY LAW

CRIMES AGAINST A CHILD

U.S. Department of Homeland Security Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act:

Subject ID: [REDACTED] PINS: [REDACTED] File No. [REDACTED]
DOB: 10/07/1960 Event No: [REDACTED]

In the Matter of:

Respondent: [REDACTED] currently residing at:

The Department of Homeland Security alleges that you:

1. You are not a citizen or national of the United States;
2. You are a native of Haiti and citizen of Haiti;
3. On October 1, 1988, you were admitted to the United States at New York, NY as a Lawful Permanent Resident (class IR-1);
4. On November 18, 2013 you were sentenced in the [REDACTED] Town Court of the State of New York for the offense of Endangering the Welfare of a Child, in violation of New York state Penal Law 260.10.

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.
☐ Section 235(b)(1) order was vacated pursuant to: ☒ 8CFR 268.30(c)(2) ☐ 8CFR 235.5(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
4250 Federal Drive Room F108 Batavia NY 14020. KOTR SPC Batavia, NY

(Complete Address of Immigration Court, including Room Number, if any)
on To be set. at To be set. to show why you should not be removed from the United States based on the
(Date) (Time)

charge(s) set forth above.  SDIB
(Signature and Title of Issuing Officer)

Date: April 23, 2015 Address: NY
(City and State)

ORDERS OF PROTECTION

IMMIGRATION & FAMILY LAW

Violation of order of protection is the only removal ground that can be satisfied with a civil court order alone.

*Any alien who at any time after admission is **enjoined under a protection order issued by a court** and whom **the court determines has engaged in conduct that violates the portion of a protective order that involves protection** against credible threats of violence, repeated harassment, or bodily injury to the person or persons whom the protection order was issued is deportable. INA 237(a)(2)(E)(ii)*

IMMIGRATION & FAMILY LAW

Protection Order

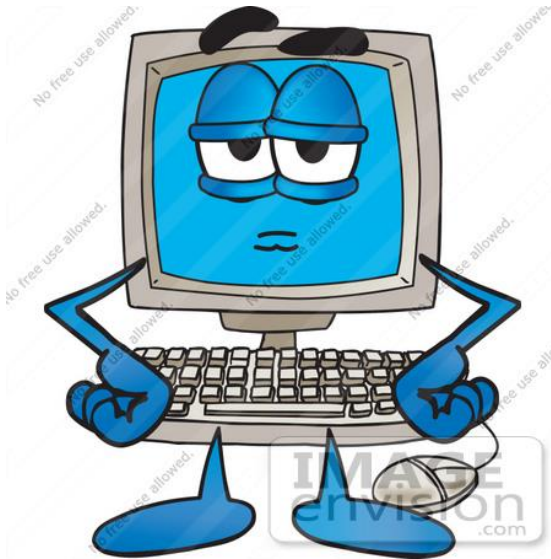


- ✓ Temporary order
- ✓ Final order
- ✓ Issued by civil court
- ✓ Issued by criminal courts
- ✓ Obtained by filing an independent action
- ✓ Obtained as a pendent lite order in another proceedings

- ☒ Any injunction
- ☒ Issued for the purpose of preventing violent or threatening acts of domestic violence
- ☒ support or child custody orders or provisions

IMMIGRATION & FAMILY LAW

Inadmissibility



**NY O/P
REGISTRY**



FBI



DHS

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- Criminal Grounds of Inadmissibility (8 USC §1182(a)(2)(A)):
*“...any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of— (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance..., is inadmissible.*

8 USC §1182(a)(2)(A); INA 212(a)(2)(A)(i)(I)

IMMIGRATION & FAMILY LAW

Crimes Involving Moral Turpitude



- ☑ Intent to cause bodily harm
- ☑ Intent to defraud
- ☑ Intent to permanently deprive an owner of property
- ☑ Act with lewd intent

Family Court Issues in Affirmative Applications

IMMIGRATION & FAMILY LAW

Good moral character

Statutory bar

- Habitual drunkard
- Crime(s) involving moral turpitude
- Drug crimes
- Multiple crimes with total sentence of more than 5 years
- Drug trafficking
- Engaged in prostitution
- Murder conviction at any time = lifetime bar
- Aggravated felony on/after 11/29/90 = lifetime bar
- Income principally from illegal gambling
- Two gambling offenses
- Confined to penal institution more than 180 days
- False testimony to obtain immigration benefit
- Alien smuggling
- Polygamy
- Nazis, genocide, torture, extrajudicial killings, violations of religious freedom
- Unlawful voting
- False claim to US citizenship

IMMIGRATION & FAMILY LAW

Regulatory bar

- Willfully failing or refusing to support dependents
- Extramarital affair that destroys existing marriage
- Unlawful acts including minor arrests and convictions
- Probation

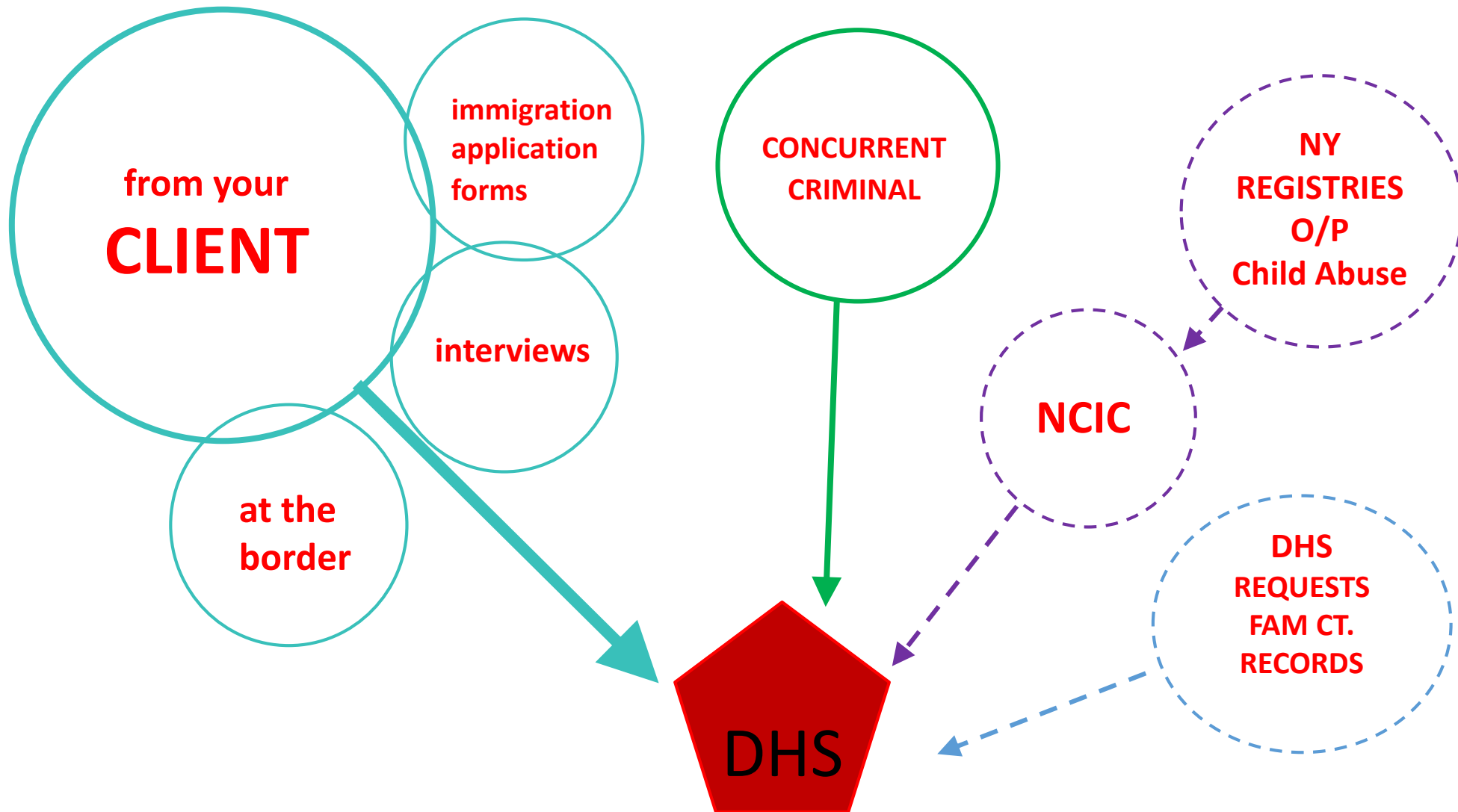
USCIS policy

- Fraudulent receipt of public benefits
- Selective Service (Men 18-26 years old)
- Failure to file taxes

Catch-all

The fact that any person is not within any of the foregoing classes shall not preclude a finding that for other reasons such person is or was not of good moral character. INA 101(f)

IMMIGRATION & FAMILY LAW



IMMIGRATION & FAMILY LAW

N-400 APPLICATION FOR NATURALIZATION (p. 16 of 21)

Answer **Item Numbers 30. - 46.** If you answer "Yes" to any of these questions, except **Item Numbers 37.** and **38.**, include a typed or printed explanation on additional sheets of paper and provide any evidence to support your answers.

30. Have you **EVER**:

- | | | |
|--|------------------------------|-----------------------------|
| A. Been a habitual drunkard? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| B. Been a prostitute, or procured anyone for prostitution? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| C. Sold or smuggled controlled substances, illegal drugs, or narcotics? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| D. Been married to more than one person at the same time? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| E. Married someone in order to obtain an immigration benefit? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| F. Helped anyone to enter, or try to enter, the United States illegally? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| G. Gambled illegally or received income from illegal gambling? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| H. Failed to support your dependents or to pay alimony? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |
| I. Made any misrepresentation to obtain any public benefit in the United States? | <input type="checkbox"/> Yes | <input type="checkbox"/> No |

IMMIGRATION & FAMILY LAW

N-400, APPLICATION FOR NATURALIZATION (p. 15 and 16 of 21)

If any of Item Numbers 22. - 28. apply to you, you must answer "Yes" even if your records have been sealed, expunged, or otherwise cleared. You must disclose this information even if anyone, including a judge, law enforcement officer, or attorney, told you that it no longer constitutes a record or told you that you do not have to disclose the information.

22. Have you **ever** committed, assisted in committing, or attempted to commit, a crime or offense for which you were **not** arrested? ☐ Yes ☐ No
23. Have you **ever** been arrested, cited, or detained by any law enforcement officer (*including any and all immigration officials or the U.S. Armed Forces*) for any reason? ☐ Yes ☐ No
24. Have you **ever** been charged with committing, attempting to commit, or assisting in committing a crime or offense? ☐ Yes ☐ No
25. Have you **ever** been convicted of a crime or offense? ☐ Yes ☐ No
26. Have you **ever** been placed in an alternative sentencing or a rehabilitative program (*e.g., diversion, deferred prosecution, withheld adjudication, deferred adjudication*)? ☐ Yes ☐ No

27. A. Have you **ever** received a suspended sentence, been placed on probation, or been paroled? ☐ Yes ☐ No
B. If "Yes," have you completed the probation or parole? ☐ Yes ☐ No
28. A. Have you **ever** been in jail or prison? ☐ Yes ☐ No
B. If "Yes," how long were you in jail or prison? Years Months Days

29. If you answered "Yes" to Item Numbers 23. - 28., complete the following table. If you need more space, use an additional sheet(s) of paper and provide any evidence to support your answer. If you answered "No" to *all* Item Numbers 23. - 28., go to Item Number 30.

Why were you arrested, cited, detained, or charged?	Date arrested, cited, detained, or charged. (mm/dd/yyyy)	Where were you arrested, cited, detained, or charged? (City, State, Country)	Outcome or disposition of the arrest, citation, detention or charge (no charges filed, charges dismissed, jail, probation, etc.)

IMMIGRATION & FAMILY LAW

EOIR-42B, Application for cancellation of removal and adjust status for certain nonpermanent residents (P. 6)

62) Have you ever been:

- | | | |
|------------------------------|-----------------------------|---|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | a habitual drunkard? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | one whose income is derived principally from illegal gambling? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | one who has given false testimony for the purpose of obtaining immigration benefits? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | one who has engaged in prostitution or unlawful commercialized vice? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | involved in a serious criminal offense and asserted immunity from prosecution? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | a polygamist? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | one who brought in or attempted to bring in another to the United States illegally? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | a trafficker of a controlled substance, or a knowing assister, abettor, conspirator, or colluder with others in any such controlled substance offense (not including a single offense of simple possession of 30 grams or less of marijuana)? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | inadmissible or deportable on security-related grounds under sections 212(a)(3) or 237(a)(4) of the INA? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | one who has ordered, incited, assisted, or otherwise participated in the persecution of an individual on account of his or her race, religion, nationality, membership in a particular social group, or political opinion? |
| <input type="checkbox"/> Yes | <input type="checkbox"/> No | a person previously granted relief under sections 212(c) or 244(a) of the INA or whose removal has previously been cancelled under section 240A of the INA? |

If you answered "Yes" to any of the above questions, explain: _____

IMMIGRATION & FAMILY LAW

I-485, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (p. 4)

Part 4. Criminal, National Security, and Public Safety Information (For Initial and Renewal Requests)

If any of the following questions apply to you, use **Part 8. Additional Information** to describe the circumstances and include a full explanation.

1. Have you **EVER** been arrested for, charged with, or convicted of a felony or misdemeanor, *including incidents handled in juvenile court*, in the United States? *Do not include minor traffic violations unless they were alcohol- or drug-related.*

☐ Yes ☐ No

If you answered "Yes," you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law.

2. Have you **EVER** been arrested for, charged with, or convicted of a crime in any country other than the United States?

☐ Yes ☐ No

If you answered "Yes," you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest.

3. Have you **EVER** engaged in, do you continue to engage in, or plan to engage in terrorist activities?

☐ Yes ☐ No

4. Are you **NOW** or have you **EVER** been a member of a gang?

☐ Yes ☐ No

5. Have you **EVER** engaged in, ordered, incited, assisted, or otherwise participated in any of the following:

- 5.a. Acts involving torture, genocide, or human trafficking?

☐ Yes ☐ No

- 5.b. Killing any person?

☐ Yes ☐ No

- 5.c. Severely injuring any person?

☐ Yes ☐ No

- 5.d. Any kind of sexual contact or relations with any person who was being forced or threatened?

☐ Yes ☐ No

6. Have you **EVER** recruited, enlisted, conscripted, or used any person to serve in or help an armed force or group while such person was under age 15?

☐ Yes ☐ No

7. Have you **EVER** used any person under age 15 to take part in hostilities, or to help or provide services to people in combat?

☐ Yes ☐ No

IMMIGRATION & FAMILY LAW

I-485, APPLICATION TO REGISTER PERMANENT RESIDENT OR ADJUST STATUS

Answer the following questions. (If your answer is "Yes" to any question, explain on a separate piece of paper. Continuation pages must be submitted according to the guidelines provided on **Page 3** of the instructions under **General Instructions**. Information about documentation that must be included with your application is also provided in this section.) Answering "Yes" does not necessarily mean that you are not entitled to adjust status or register for permanent residence.

1. Have you EVER, in or outside the United States:

- | | | |
|--|------------------------------|-----------------------------|
| a. Knowingly committed any crime of moral turpitude or a drug-related offense for which you have not been arrested? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| b. Been arrested, cited, charged, indicted, convicted, fined, or imprisoned for breaking or violating any law or ordinance, excluding traffic violations? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| c. Been the beneficiary of a pardon, amnesty, rehabilitation decree, other act of clemency, or similar action? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| d. Exercised diplomatic immunity to avoid prosecution for a criminal offense in the United States? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |

- | | | |
|---|------------------------------|-----------------------------|
| 2. Have you received public assistance in the United States from any source, including the U.S. Government or any State, county, city, or municipality (other than emergency medical treatment), or are you likely to receive public assistance in the future? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
|---|------------------------------|-----------------------------|

3. Have you EVER:

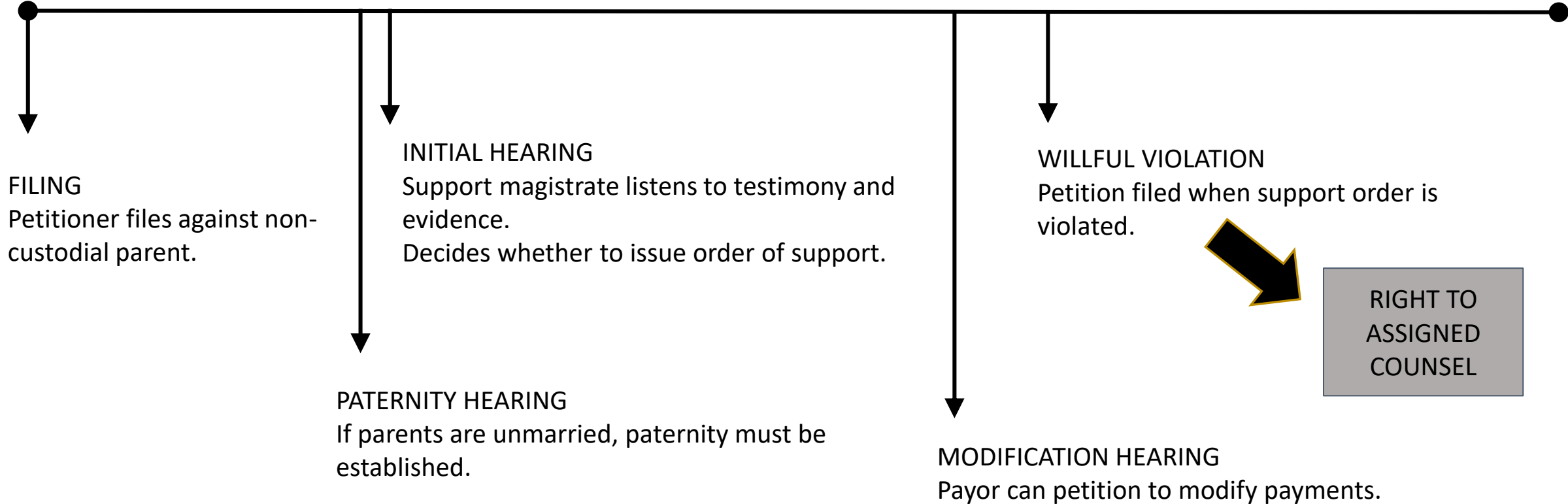
- | | | |
|---|------------------------------|-----------------------------|
| a. Within the past 10 years been a prostitute or procured anyone for prostitution, or intend to engage in such activities in the future? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| b. Engaged in any unlawful commercialized vice, including, but not limited to, illegal gambling? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| c. Knowingly encouraged, induced, assisted, abetted, or aided any alien to try to enter the United States illegally? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
| d. Illicitly trafficked in any controlled substance, or knowingly assisted, abetted, or colluded in the illicit trafficking of any controlled substance? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |

- | | | |
|---|------------------------------|-----------------------------|
| 4. Have you EVER engaged in, conspired to engage in, or do you intend to engage in, or have you ever solicited membership or funds for, or have you through any means ever assisted or provided any type of material support to any person or organization that has ever engaged or conspired to engage in sabotage, kidnapping, political assassination, hijacking, or any other form of terrorist activity? | Yes <input type="checkbox"/> | No <input type="checkbox"/> |
|---|------------------------------|-----------------------------|

SUPPORT

IMMIGRATION & FAMILY LAW

Support



IMMIGRATION & FAMILY LAW

Willful failure or refusal to support dependents can be a bar to naturalization. It prevents someone from demonstrating they are a person of “good moral character”

- ONLY for the 5 years leading up to the naturalization application.
- AFTER 5 years, the government can still consider failure to support in discretion. 8 USC 1427

The same considerations apply if any kind of waiver is necessary for other forms of immigration relief.

It is **NOT** a ground of deportation.

IMMIGRATION & FAMILY LAW

EXTENUATING CIRCUMSTANCES

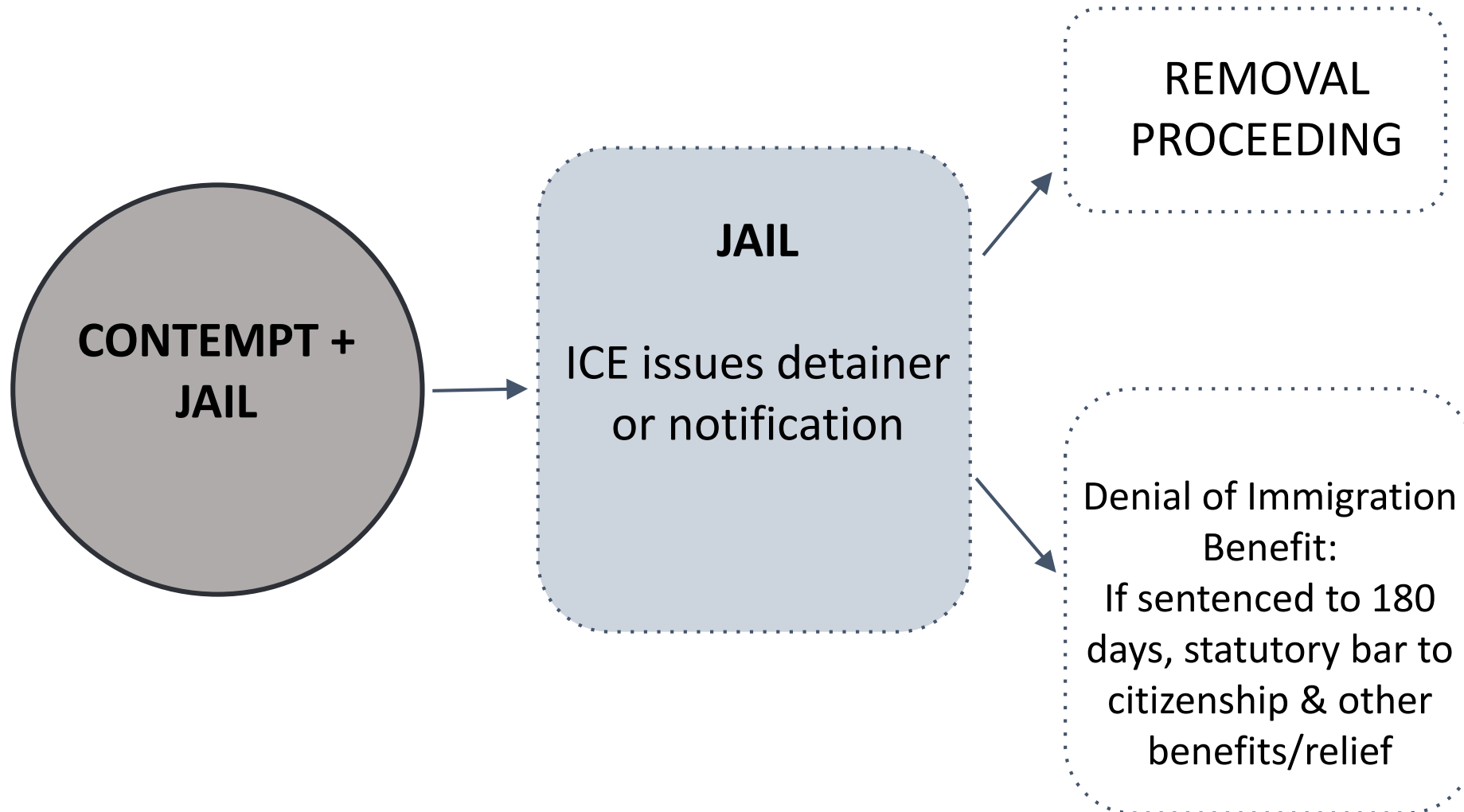
If applicant can show “extenuating circumstances” the failure to pay support may not bar GMC. Evidence could include:

- Unemployment and financial inability to pay
- Good-faith effort to reasonably provide for the support
- Miscalculation of court-ordered arrears
- Honest but mistaken belief that support order had ended.

USCIS Policy Manual: <https://www.uscis.gov/policymanual/Print/PolicyManual-Volume12-PartF-Chapter5.html>

CONTEMPT & INCARCERATION

IMMIGRATION & FAMILY LAW



CUSTODY

IMMIGRATION & FAMILY LAW

The impact of certain findings, dispositions and outcomes imposed in a custody proceeding may impact a noncitizen parent's custody of children differently than that of a U.S. citizen parent and may have an adverse immigration consequence directly on the immigration status of a noncitizen parent or child.

- Custody proceeding between two noncitizen parents
- Custody proceeding between one USC parent and one noncitizen parent
- Custody proceeding between USC non-parent (e.g. grandparent) and noncitizen parent

- UNDER THE AGE OF 18
(on or after February 27, 2001)



- ONE PARENT IS A U.S. CITIZEN
(note: If adopted and adoption completed before client's 16th birthday)



- RESIDED IN PHYSICAL & LEGAL
CUSTODY OF U.S. CITIZEN PARENT



- CLIENT LAWFULLY ADMITTED
TO THE U.S. AS AN IMMIGRANT
(i.e., admitted as a green card holder)

U.S. Citizenship Act of 2000
See 8 USC §1431



**AUTOMATICALLY
ACQUIRES
U.S. CITIZENSHIP**

NOTE: If client has a U.S. citizen parent(s), refer to Immigrant Legal Resource Center (ILRC) Naturalization Quick Reference Charts available at <http://www.ilrc.org/info-on-immigration-law/citizenship-naturalization>

JUVENILE DELINQUENCY

IMMIGRATION & FAMILY LAW

- Juvenile adjudication is not a conviction for immigration purposes.
- However, there are still significant immigrant consequences.
 - Conduct-based grounds of removal: violation of order of protection
 - Inadmissibility grounds: ‘reason to believe’ participation in drug trafficking.
 - Denial of Application for immigration relief as a matter of discretion

IMMIGRATION & FAMILY LAW

CONDUCT-BASED FINDINGS THAT MAY BAR IMMIGRATION RELIEF

- **Prostitution** (i.e., finding of engaging in sex for money within past 10 years is inadmissible) 8 USC § 1182(a)(2)(D)
- **Drug Trafficking** (i.e., “reason to believe” of assisting in or drug trafficking is inadmissible but not deportable) 8 USC § 1182(a)(2)(C)
 - **NOTE:** spouse/children also inadmissible if received any “financial or other benefit” from the drug trafficking within the previous 5 years. 8 USC § 1182(a)(2)(C)(ii)
- **Drug Addict or Abuser** (i.e., inadmissible if a “current” drug addict or abuser, and deportable if he/she has been one at any time since admission to the U.S. within the past 3 years) 8 USC §1182(a)(1)(A)(iii) (inadmissibility) and 8 USC §1227(a)(2)(B)(ii) (deportability).

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CONDUCT-BASED FINDINGS THAT MAY BAR IMMIGRATION RELIEF

- **False Documents** (i.e., finding may provide evidence to support referral to special civil court that may trigger removal from the U.S.) 8 USC §§ 1182(a)(6)(F), 1227(a)(3)(C).
- **Sexual Predator** (i.e., mental condition that poses a current threat to self or others may be inadmissible under a separate medical category) 8 USC § 1182(a)(1)(A)(iii).
- **Crimes Against Minors** (i.e., if convicted pursuant to the Adam Walsh Child Protection and Safety Act of 2006, cannot file family-based immigration petitions
 - **NOTE:** See § 111(a) of Adam Walsh Act which includes certain juvenile delinquency

IMMIGRATION & FAMILY LAW

I-485, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS (p. 4)

Part 4. Criminal, National Security, and Public Safety Information (For Initial and Renewal Requests)

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If you answered "Yes," you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law.

2. Have you **EVER** been arrested for, charged with, or convicted of a crime in any country other than the United States? ☐ Yes ☐ No

If you answered "Yes," you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest.

3. Have you **EVER** engaged in, do you continue to engage in, or plan to engage in terrorist activities? ☐ Yes ☐ No

4. Are you **NOW** or have you **EVER** been a member of a gang? ☐ Yes ☐ No

5. Have you **EVER** engaged in, ordered, incited, assisted, or otherwise participated in any of the following:

- 5.a. Acts involving torture, genocide, or human trafficking? ☐ Yes ☐ No

- 5.b. Killing any person? ☐ Yes ☐ No

- 5.c. Severely injuring any person? ☐ Yes ☐ No

- 5.d. Any kind of sexual contact or relations with any person who was being forced or threatened? ☐ Yes ☐ No

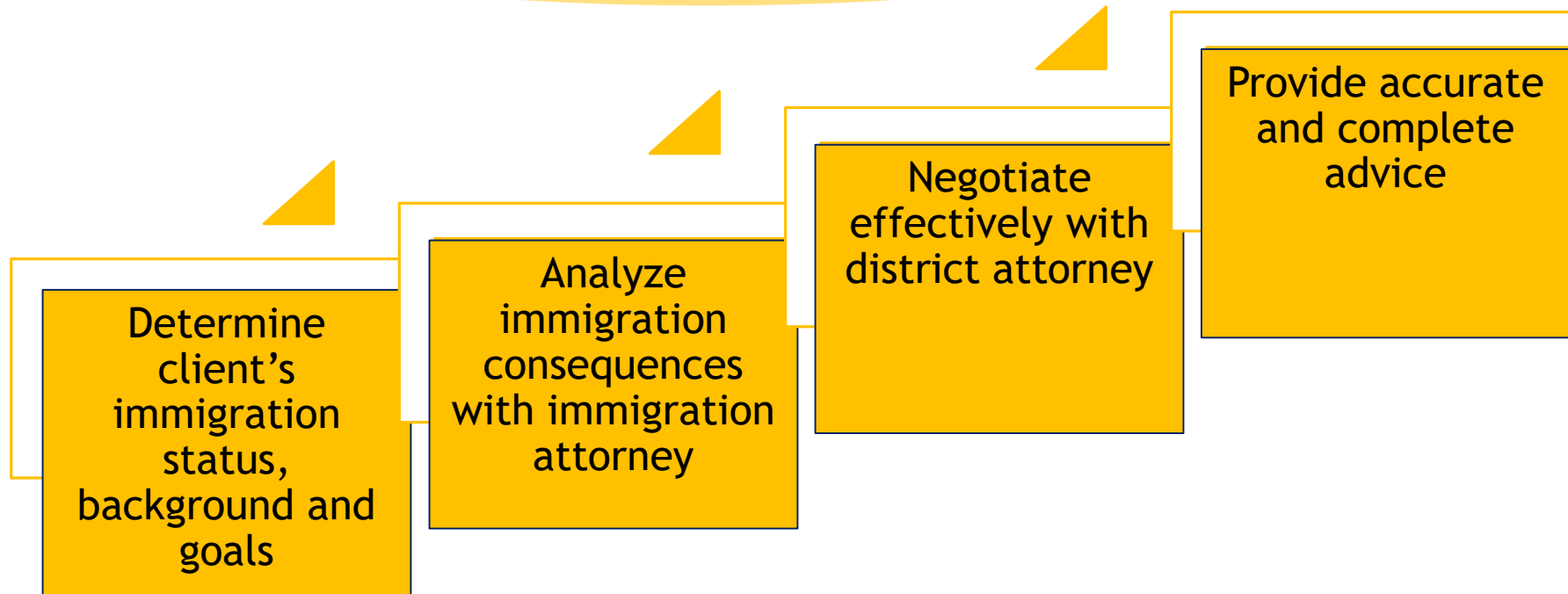
6. Have you **EVER** recruited, enlisted, conscripted, or used any person to serve in or help an armed force or group while such person was under age 15? ☐ Yes ☐ No

7. Have you **EVER** used any person under age 15 to take part in hostilities, or to help or provide services to people in combat? ☐ Yes ☐ No



IMMIGRATION & FAMILY LAW

DUTIES OF DEFENSE COUNSEL



IMMIGRATION & FAMILY LAW

WHAT ATTORNEYS NEED TO KNOW!

- Citizenship or Nationality (WHERE WERE YOU BORN?)
- Immigration status
- Manner of entry and length of time in the U.S. (I.E., First and last trip into the U.S.)
- Any prior criminal or family history and immigration history
- Any “immediate family” in the U.S.
- In removal proceedings?
- Pending immigration applications
- Future immigration applications

IMMIGRATION & FAMILY LAW

- Adjourn to allow time for advice on immigration consequences.
- Get RIAC involved as early as possible.
- Verify by investigation of information provided by client.
- Be mindful of any deadlines that could jeopardize a litigant's ability to gain or maintain immigration status, (ex. under age 16 for adoption and 21 for SIJS in Family court).
- Use out-of-court interpreters/translators when necessary.

Additional Resources

Attorney/Judicial Resources

- The Intersection of Immigration Status and the New York Family Courts by the Fund For Modern Courts,
<http://moderncourts.org/files/2014/03/Modern-Courts-Statewide-Report-The-Intersection-of-Immigration-Status-and-the-New-York-Family-Courts.pdf>
- NYS OCA Advisory Council on Immigration Issues in Family Court – provides various family court/immigration advisories
- Regional Immigration Assistance Center for referrals and/or legal advice
<https://www.ils.ny.gov/content/regional-immigration-assistance-centers>
- Immigration Benchbook for Juvenile and Family Courts by the ILRC,
<https://www.ilrc.org/immigration-benchbook-juvenile-and-family-courts>

DHS Resources

➤ *Detention and Removal of Alien Parents or Legal Guardians* <https://www.ice.gov/parental-interest>

➤ **Locating a Parent:** To find a detained parent, use Alien Number & country of birth or exact name, country of birth, and date of birth : <https://locator.ice.gov>

➤ **DHS Call Center:** Detention Reporting and Information Line (DRIL) 1-888-351-4024 or
Parental.Interest@ice.dhs.gov

➤ **Local Contact Information:**

➤ DHS ICE NYC FIELD OFFICE: (212) 264-4213

➤ DHS ICE BUFFALO FIELD OFFICE: (716) 843-7600

➤ DHS Buffalo Federal Detention Facility (Batavia, NY): (585) 344-6500 (VTC capability)

REGIONAL IMMIGRATION ASSISTANCE CENTERS

Region #1: Western New York

Erie County Bar/Volunteer Lawyers' Project
237 Main Street, Suite 1000
Buffalo, New York 14203
P: (716) 847-0662

Region #2: Central New York

Oneida County Courthouse
302 N. James Street
Rome, New York 13440
P: (315) 356-5794

Region #3: Capital District & Northern NY

112 State Street, Suite 900
Albany, New York 12207
P: (518) 447-4890



Region #4: Mid-Hudson

Legal Aid Society of Westchester County
150 Grand Street, 1st Floor
White Plains, New York 10601
P: (914) 286-3400

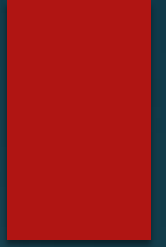
Region #5: New York City

Immigrant Defense Project
40 W 39th Street, 5th Floor
New York, New York 10018
P: (212) 725-6422

Region #6: Long Island

Legal Aid Society of Suffolk County
Cohalan Court Complex
400 Carleton Ave., 4th Floor
Central Islip, NY 11722
P: (631) 853-7770 → Suffolk County
P: (516) 560.6400 → Nassau County

Immigration Issues in Family Court



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Immigration Assistance Center

Mary E. Armistead, Esq., Equal Justice Works Crime Victims Justice
Corps Fellow, The Legal Project

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Pathways to Immigration Status

- ▶ Family
 - ▶ Immediate relatives
 - ▶ Spouse, child (under 21 and unmarried), or parent of a US Citizen
 - ▶ Preference Relatives
 - ▶ Older or married children and siblings of US Citizens
 - ▶ Spouse, children, or parent of LPR
- ▶ Employment
 - ▶ Primarily for skilled/educated workers (only 10,000 per year for unskilled workers)
- ▶ Diversity Visa
- ▶ **Humanitarian Status**

When Immigration Status is Irrelevant

All persons, regardless of immigration status, have access to:

- ▶ Police assistance and criminal prosecution of abusers
- ▶ Victim's assistance
- ▶ Protection orders
- ▶ Child custody and support
- ▶ Obtaining public benefits for their US citizen children
- ▶ Emergency medical care



Humanitarian Pathways to Immigration Status related to Family Court

Special Immigrant Juvenile Status (SIJS)

- ▶ Pathway to green card for some immigrant children
- ▶ SIJS involves certain determinations made by state courts.
 - ▶ The Family Court cannot grant immigration status
 - ▶ The Family Court issues findings of fact in a “SIJS Predicate Order” that allows child to apply for SIJS and Lawful Permanent Residence
- ▶ 5 criteria to be SIJS-eligible:
 - ▶ Under 21 years old and unmarried
 - ▶ Declared dependent on a juvenile court, or placed under the custody of an agency, department of a State, or an individual or entity appointed by juvenile court
 - ▶ Unable to be reunited with one or both parents due to abuse, neglect, abandonment, or a similar basis found under State law (e.g. death)
 - ▶ It is in the child’s best interests not to be returned to their home country

SIJS Process



SIJS grantees can never petition for either parent,
even after becoming US Citizens.

SIJS Dependency Prong

- ▶ Federal legal language:

- ▶ “who has been declared dependent on a juvenile court or whom such a court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court....”

- ▶ As applied to NY State Family Courts:

- Guardianship

- Destitute Child proceedings

- Custody

- Persons in Need of Supervision (PINS)

- Family Offenses

- Delinquency (but negative 2d Dept case)

- Abuse & Neglect proceedings

Custody vs. Guardianship

CUSTODY

- ▶ Can be granted until age 18
- ▶ Adult must initiate filing
- ▶ If non-parent seeks custody, must prove “extraordinary circumstances”
- ▶ Affects parental rights
- ▶ Service of process on parents usually required
- ▶ Criminal & child abuse background checks generally not required
- ▶ May require COI of child's home

GUARDIANSHIP

- ▶ Can be granted until age 21
- ▶ Child over 14 can initiate; Adult can initiate
- ▶ Standard : best interest of the child
- ▶ Does not affect parental rights
- ▶ Service of process may not be required (see SCPA 1705[a][2])
- ▶ Child abuse background checks required for the past 28 years for everyone age 18+ in guardian's household
- ▶ Criminal background check via fingerprints of all adults may be requested but ARE NOT STATUTORILY REQUIRED (see SCPA 1704[8])
- ▶ Guardianship may require COI of guardian's home, COI of child's home

SIJS Reunification Prong

- ▶ Federal legal language:
 - ▶ “whose reunification with 1 or both of the immigrant’s parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law.”
- ▶ As applied to NY State Family Courts:
 - ▶ Children of single parents may be SIJS eligible
 - ▶ “[T]he ‘1 or both’ language requires only a finding that reunification is not viable with 1 parent.” *Matter of Marcelina M.G.*, 973 N.Y.S.2d 714 (2d Dep’t 2013).
 - ▶ Abuse, abandonment, and neglect as defined by NY State Law: FCA 1012 (e) and (f) and SSL 384-b and accompanying case law
 - ▶ Similar basis under state law has been defined to include only death so far. See *Luis R. v. Maria Elena M.G.*, 120 A.D.3d 581, 582 (2d Dept. 2013).

SIJS Best Interest Prong

- ▶ Federal legal language:
- ▶ “for whom it has been determined... that it would not be in the alien’s best interest to be returned to the alien’s or parent’s previous country of nationality or country of last habitual residence”
- ▶ As applied to NY State Family Courts:
 - ▶ New York Family Court best interest standard applies, which looks to the “totality of the circumstances” when making an assessment as to a minor’s best interests. *Eschbach v. Eschbach*, 56 N.Y. 2d 167, 172-173 (N.Y. 1982).
 - ▶ Can include:
 - ▶ Emotional, educational, medical & social needs
 - ▶ Wishes of the child
 - ▶ Quality of home environment

Importance of the Special Findings Order (SFO)

- ▶ The United States Citizenship and Immigration Services (USCIS), in charge of adjudicating SIJS applications, is **VERY PICKY** about what is included in the SFO and they **ADD NEW REQUIREMENTS FREQUENTLY**
- ▶ The NY GF-42 form cannot keep up with USCIS' changing requirements
- ▶ PLEASE reach out to an immigration attorney PRACTICED in SIJS for help!!!!

U-Visas/U Nonimmigrant Status for Victims of Qualifying Crimes

- ▶ Purpose: encourage immigrants to report crimes and cooperate with law enforcement; encourage law enforcement to work with and protect immigrant victims
- ▶ Immigration relief for victims of qualifying crimes that occurred in the U.S. who (1) have information about the crime (2) are helpful to law enforcement and (3) suffered substantial harm as a result of the crime
- ▶ Immigration status of both victim and perpetrator is irrelevant
- ▶ Certain “indirect victims,” such as parents of child victims, may be eligible to apply as well

U-Visa— Qualifying Crimes

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contracting

- Hostage
- Incest
- Involuntary Servitude
- Kidnapping
- Manslaughter
- Murder
- Obstruction of Justice
- Peonage
- Perjury
- Prostitution
- Rape

- Sexual Assault
- Sexual Exploitation
- Slave Trade
- Stalking
- Torture
- Trafficking
- Witness Tampering
- Unlawful Criminal Restraint

U- Visa Supplement B: Law Enforcement Certification

- ▶ **Must have** signed I-914 Supplement B (aka I-914B or Supp B) certification from law enforcement
 - ▶ Law enforcement defined as: Any Federal, state, or local law enforcement authority (including prosecutors and **judges**) that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity
 - ▶ Not limited to criminal court/prosecution
 - ▶ Family court and other judges with “investigatory power” can sign the certification

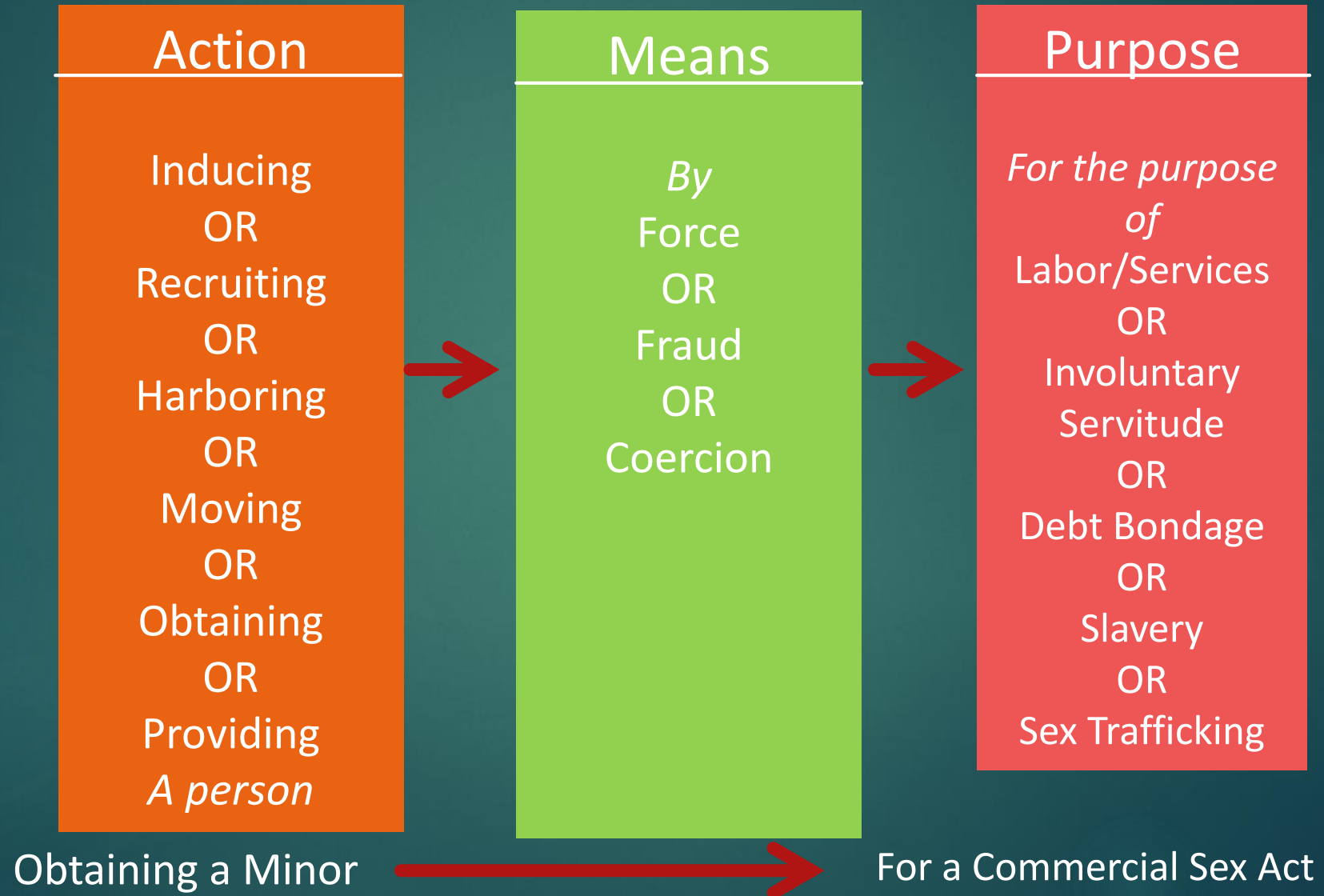
U-Visas – Benefits and Limitations

- ▶ U-status is valid for four years and allows employment authorization
- ▶ Eligible to apply for green card after three years
- ▶ Principal applicant may be able to apply for certain derivatives as well (spouse and children if over 21, children, spouse, parents and siblings if under 21)
- ▶ 10,000 annual limit. Waiting list may provide deferred action and employment authorization. Current wait time approximately 14 years.

T-Visas

- ▶ Type of visa that provides immigration status to survivors of a severe form of human trafficking (includes both labor and sex trafficking)
- ▶ Must be physically present in the U.S. on account of such trafficking
- ▶ Show that cooperated with reasonable requests for assistance in the investigation or prosecution of trafficking (if 18 years old or over)
- ▶ Cooperation exception for survivors who have experienced physical or psychological trauma that prevents them complying with a reasonable request from law enforcement
- ▶ Must show that would suffer extreme hardship upon removal from the U.S.

Action-Means-Purpose (AMP) Model



T-Visas - Benefits

- ▶ Provides 4 years of lawful immigration status (with employment authorization)
- ▶ Can apply for green card after 3 years (sometimes sooner)
- ▶ Principal applicant may be able to apply for certain derivatives as well (spouse and children if over 21, children, spouse, parents and siblings if under 21)
- ▶ Cap of 5,000 T visas per year, but cap has never been met - available more quickly than U visas: processing times currently are about 2 years)
- ▶ Eligible for same benefits as refugees, including cash assistance, food stamps, and job training

Violence Against Women Act (VAWA) Self-Petition

- ▶ Purpose: to allow victims the opportunity to “self-petition” or independently seek legal immigration status in the U.S.
- ▶ Provides immigration relief to abused spouses, children, or parents of U.S. citizens (USCs) or Lawful Permanent Residents (LPRs)
 - ▶ Parent or child can either be petitioner if subject or abuse or derivative if not subject of abuse
- ▶ Confidentiality provisions: ability to petition for relief without the knowledge of abuser

VAWA – Spouse Eligibility Requirements

VAWA Petitioning Spouse must show that:

- ▶ Married to a USC or LPR abuser or that marriage was terminated by death or divorce within 2 years prior to filing the petition
- ▶ Resided with the abusive spouse
- ▶ Married the spouse in good faith
- ▶ Was battered or subject to extreme cruelty during the marriage
- ▶ Good moral character

VAWA – Child/Parent Eligibility Requirements

VAWA Petitioning Spouse must show that:

- ▶ Child of a U.S. citizen or LPR or Parent of a USC or LPR who is at least 21 years old at time of filing
 - ▶ Or Child/Parent has been deceased less than 2 years
- ▶ Resided with the abusive parent/child
- ▶ Was battered or subject to extreme cruelty by parent/child
- ▶ Good moral character

VAWA– Types of Evidence

- ▶ Comingled finances, proof of joint residence, other documents showing lives were intertwined
- ▶ Proof of children together (including family court petitions, orders, etc.)
- ▶ Police reports, Orders of Protection, Medical records
- ▶ Evidence of having sought shelter away from abuser
- ▶ Self-Petitioner's detailed affidavit, affidavit of witnesses
- ▶ Evaluation by mental health professional, especially with DV experience
- ▶ Photographs, texts and social media evidencing relationship and/or abuse

Immigration Relief: Battered Spouse Waiver

- ▶ Available to abused spouses who were granted conditional resident status through marriage to a U.S. citizen or permanent resident and hold a 2- year “conditional green card”
- ▶ After 2 years, such persons are required to petition to remove the conditions on their green card jointly with their spouse
- ▶ Waiver of joint filing requirement for individuals who were battered or subject to extreme cruelty during the marriage
- ▶ Similar evidence requirements to VAWA self-petition
- ▶ Once conditions are removed, petitioner becomes LPR and can apply to become a USC after three years

Immigration Relief: Asylum (I-589)

- ▶ Statutory Definition: “any person . . . who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of th[eir] country [of nationality] because of persecution or a well-founded fear of persecution on account of race, religion, nationality, political opinion, or membership in a particular social group.”
- ▶ Elements:
 - ▶ “Well-Founded Fear”
 - ▶ of “Persecution”
 - ▶ Perpetrated by either (1) the government or (2) an entity the government cannot/will not control
 - ▶ “On account of”
 - ▶ A protected Ground:
 - ▶ (1) Race, (2) Religion, (3) Nationality, (4) Political Opinion, or (5) Membership in a Particular Social Group

Asylum: One-Year Filing Deadline

- Application for asylum must be filed within one year of most recent arrival in the U.S.
 - ▶ I.E. Entry on October 5, 2017 → File application by October 5, 2018
INA § 208(a)(2)(B); 8 C.F.R. § 208.4 (a)
- Exceptions:
 - ▶ Changed circumstances that materially affect eligibility, or
 - ▶ Extraordinary circumstances (e.g. mental or physical illness, legal disability, incapacity, lawful status) INA § 208(a)(2)(D); 8 C.F.R. § 208.4(a)
 - ▶ Must file within a “reasonable” period of time since the changed or extraordinary circumstance

Particular Social Group

- ▶ Where do we stand now in the 2nd circuit?
- ▶ To be a cognizable Particular Social Group, must show:
 - ▶ 1) “common, immutable characteristic”
 - ▶ 2) “social distinction”
 - ▶ 3) sufficient “particularity”

Asylum History

Matter of A-R-C-G 2014

- ▶ First precedent decision firmly recognizing domestic violence (and, in particular, intimate partner violence) as a valid basis for asylum
- ▶ Narrow legal holding: recognized as cognizable particular social group of “married women in Guatemala who are unable to leave their relationship”
- ▶ Following A-R-C-G-, was applied to claims involving women from various countries and unmarried women, as well as by analogy in child abuse claims.

Asylum History continued...

- ▶ Matter of A-B- (2018): Attorney General overrules Matter of A-R-C-G- on procedural grounds
- ▶ Grace v. Whitaker (2018): Overruled M/o A-B-
 - ▶ There cannot be a presumption against DV or gang-based asylum; must adjudicate ALL asylum claims on a case-by-case basis under the 5-factor test



Ethical Issues in Representing Immigrants in Family Court

Parental Interest Directive/ Detained Parents Directive

- ▶ Gives immigration enforcement officials guidance for family members in custody that may have family members, including children, who are in the United States.
- ▶ 2018 directive replaced initial 2013 directive and eliminated certain key pieces:
 - ▶ the emphasis on applying prosecutorial discretion to parents and primary caregivers and
 - ▶ the use of humanitarian parole to assist parents in returning to the U.S. to participate in proceedings that would lead to termination of their parental rights.
- ▶ Directs ICE officers, where practicable:
 - ▶ To allow parents, legal guardians, and primary caretakers involved in ongoing family or dependency court proceedings to appear in person or telephonically
 - ▶ To allow detained parents, legal guardians, and primary caretakers to visit with their children
 - ▶ To enable parents/guardians with final removal orders to arrange for the care or travel of their children prior to being removed
- ▶ “[T]he directive . . . does not create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil or criminal matter.”

Duty of Competence

NYRPC 1.1: (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.

NYRPC 1.2: (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.

Family Court v. Immigration Court

Best Outcomes

NYRPC 1.1 (c) A lawyer shall not intentionally:

- 1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
- (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

NYRPC 1.2 (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter.

Dual Representation

- ▶ Conflict Rules 1.7 through 1.9
- ▶ Split Representation between family court and immigration proceedings
 - ▶ i.e. represent adult in family court to obtain guardianship/custody and Special Findings Order, and then child in SIJS immigration application
 - ▶ Can be difficult to avoid if seeking custody or child is under 14
 - ▶ NY Eth. Op. 1069: Conflict of Interest; Simultaneous Representation
 - ▶ Recognizes that it is a situation ripe for conflict, but is not a per se conflict
 - ▶ Central question: “whether representing both the proposed guardian in Family Court and the child in Immigration Court would create an impermissible conflict of interest.”

Obtaining Consent from Unrepresented Parties

RULE 4.3: COMMUNICATING WITH UNREPRESENTED PERSONS

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

- ▶ SIJS: waivers from parents in foreign countries, Oaths from proposed guardians
- ▶ Family Offense: consent to OP from someone you believe may not be a US Citizen, knowing it could effect their status
- ▶ Custody: consent to an arrangement that wouldn't allow a parent to take their children abroad if deported



Questions?

THANK YOU!

Contact Information

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Deputy Director

Albany County Immigration Assistance Center

Evelyn.Kinnah@albanycountyny.gov

518-447-4890

Mary E. Armistead, Esq.

EJW Crime Victims Justice Corps Fellow

The Legal Project

marmistead@legalproject.org

518-435-1770 ext. 328

Mock Appearance

Mom: Gloria Martinez Navarro

Dad: Hector Morales Ramirez

Children: Luisa Morales Martinez (age 5), Cristian Morales Martinez (age 7)

Legal Posture:

Gloria and Hector are not married but have 2 children together. They lived together until a few months ago when Gloria moved out with the kids.

Gloria filed a pro se family offense petition against Hector on January 2 alleging that he has physically abused her and their 2 children. She was given an ex parte temporary order of protection that same day and an appearance was scheduled for January 16. In that appearance, both parties appeared pro se. The children were represented by Lisa Mendel, Esq., who had met and conducted an age appropriate interview with them the day before. Hector denied the allegations and said that he wanted to file for custody. He then filed a custody petition seeking sole custody of the kids, alleging that Gloria was alienating the kids from him and that she yells at the children frequently and doesn't supervise them adequately. The AFC stated that she believed both parties were indigent and that everyone would benefit from representation by appointed counsel. The judge, Hon. Richard Rivera, determined that both parties were indigent and adjourned for counsel to be appointed for both, setting the next appearance for February 4th. Mary Armistead, Esq. was appointed for Gloria and Pat Rodriguez, Esq. appointed for Hector.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF

Gloria Martinez Navarro
Petitioner

Docket No. 0-12345-20

-against-

Hector Morales Ramirez
Respondent

FAMILY OFFENSE
PETITION

TO THE FAMILY COURT:

The undersigned Petitioner respectfully states that:

1. a. I reside at [specify address unless confidential]:¹

123 Main St
Albany, NY 12206

b. The Respondent resides at [specify address unless confidential]:

345 Broadway
Albany, NY 12206

2. a. The Respondent and I are related as follows [check all applicable box(es)]:

☐ we are married

☐ we were married

☒ we have a child in common

☐ we are parent and child

☐ we are related by blood or marriage [specify how]:

☐ we are in an intimate relationship (NOT casual social or business acquaintances)
[describe]:

☒ we were in an intimate relationship (NOT casual social or business
acquaintances) [describe]:

☐ we live together ☒ we lived together in the past ☐ we never lived together

b. ☐ Petitioner is a duly authorized agency, association, society or institution and is filing
this petition pursuant to F.C.A. §822(b).

c. ☐ I am a peace officer and am filing this petition pursuant to F.C.A. §822(c).

3. The Respondent committed the following family offense(s) against me and/or my children,
which constitute(s) [Check applicable box(es)]:

☐ Disorderly conduct

☒ Harassment in the first or second degree

☐ Aggravated harassment in the second degree

☒ Assault in the second or third degree

☐ Criminal mischief

☐ Sexual abuse in the second² or third degree

☐ Strangulation

☐ Identity theft in 1st, 2nd or 3rd degree

☐ Coercion in 2nd degree [Penal Law §135.60 (1),(2),or (3)]

☐ Unlawful dissemination or publication of intimate image(s) [Penal Law §245.15]

☐ Menacing in the second or third degree

☐ Reckless endangerment

☐ Stalking

☐ Attempted assault

☐ Sexual misconduct

☐ Forcible touching

☐ Criminal obstruction of breathing or circulation

☐ Grand larceny in 1st, 2nd, 3rd or 4th degree

¹ If your health or safety or that of your child or children would be put at risk by disclosure of your address or other identifying information, you may apply to the Court for an address confidentiality order by submitting General Form GF-21, which is available on-line at www.nycourts.gov. See Family Court Act §154-b.

² Where victim is incapable of consent for reason other than being under age 17 [Penal Law §130.60(1)].

[Describe each incident; starting with the most recent incident; state date, time and location of each incident; specify all injuries and if any weapons were used. Use additional sheets where necessary]:

Hector came to my house on New Year's Day, forced his way in, and pushed me to the ground. He only left because my aunt said she would call the police. He hit me and my kids a lot when we lived with him.

4. I ☐ have ☒ have not filed a criminal complaint concerning these incident(s)
[If so, please indicate court, county, date, charge(s) and status, if known]:

5. [Check applicable box(es)]:

☐ a. I have no children and there are no other children living in my home.

☐ b. The following children live with me [include children who are not yours]:

Name Date of Birth Relationship to Me Relationship to Respondent

Luisa Morales Martinez, 8/20/2014, daughter of me & Hector
Cristian Morales Martinez, 5/10/2012, son of me and Hector

☐ c. The following children are mine but do not live with me.

Name Date of Birth Lives With Child's Relationship to Respondent, if any

☒ e. The Respondent committed family offenses against the above child or children as follows [describe including name(s) of child or children, nature of offense(s) and date(s)]:³

When Hector came on New Years he scared the kids because he broke in and he has hit them a lot in the past

[Check boxes and complete any of the following paragraphs 6-13 that apply to you. Skip any that do not apply to you.]

☒ 6. The Respondent has acted in a way I consider dangerous or threatening to me, my children or any member of my family, in addition to the incident(s) described in question 3, as follows [describe]:

when we lived with Hector he would hit me a lot and leave marks. He hit the kids too.

☐ 7. The Respondent was found to have violated an Order of Protection issued on behalf of me or members of my family or household as follows [describe]:

☐ 8. The Respondent owns or has access to guns as follows [describe]:

9. ☐ a. The Respondent has a gun license or pistol permit for the following gun(s) as follows [describe]:

☐ b. The Respondent has a gun license or permit application pending as follows [describe]:

³ Family offenses include the crimes of: assault or attempted assault, aggravated harassment or harassment, disorderly conduct, menacing, reckless endangerment, stalking, sexual abuse, sexual misconduct, forcible touching, strangulation, criminal obstruction of breathing or blood circulation, identity theft, criminal mischief, grand larceny, coercion and unlawful publication or dissemination of intimate images.

☐ c. The Respondent carries a gun on his or her job as follows [describe]:

10. ☐ a. The Respondent threatened [check applicable box(es)]:

- ☐ me ☐ my child or children [specify]:
☐ a member or members of my household [specify]:
with a gun or dangerous instrument or object as follows [specify]:

☐ b. There is a substantial risk that Respondent would use or threaten to use a firearm or dangerous instrument or object against me, my child(ren) or member of my household on the basis of the following facts and for the following reasons [describe]:

☐ 11. The following court cases are pending between me and the Respondent [specify court, county, docket or index number, nature of action and status, if known]:

☒ 12. The Respondent has the following criminal convictions [specify, including date, crime, sentence and court, if known]: 2 misdemeanors, but I don't know what for

☐ 13. [Applicable where protection is sought for pet(s)]:

a. The following pets live in my house [specify name(s) and type(s)]:

b. The Respondent injured or tried or threatened to injure pets in my household as follows [describe]:

14. I have not made any previous application to any court or judge for the relief requested in this petition, (except [specify the relief, if any, granted and the date of such relief; delete if inapplicable]:).

WHEREFORE, Petitioner respectfully requests this Court to:

- a. adjudge the Respondent to have committed the family offense(s) alleged;
- b. enter an order of protection, specifying conditions of behavior to be observed by the Respondent in accordance with Section 842 of the Family Court Act;
- c. enter a finding of aggravated circumstances [delete if inapplicable];
- d. enter a temporary order of child support in accordance with Family Court Act §828(4) [delete if inapplicable];
- e. enter an order directing the parties to appear within seven business days of the filing of this petition for consideration of an order of temporary spousal support in accordance with Family Court Act §828(5); [delete if inapplicable]
- f. order such other and further relief as to the Court seems just and proper.

Dated: 1/2/2020

Gloria Martinez Navarro

Petitioner: (print or type name)

Gloria Martinez

/ Signature

Petitioner's Attorney, if any (print or type name) / Signature

Address and telephone number of Attorney, if any

FCA §§ 467, 549, 651, 652, 654; DRL §§ 75-1, 240¹Petition-Custody, Visitation)
3/2018FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF

In The Matter of a Proceeding for

☒ Custody ☐ Visitation under Article ☐ 4 ☐ 5 ☐ 6
of the Family Court Act or Section 240
of the Domestic Relations LawHector Morales Ramirez

Petitioner

Relationship to child: fatherFamily File No. 12345
Docket No. V-12345-20
PETITION V-12346-20
☒ CUSTODY ☐ VISITATION

-against-

Gloria Martinez Navarro

Respondent

Relationship to child: mother

TO THE FAMILY COURT:

The Petitioner respectfully alleges upon information and belief that:

1. The name, gender, current address and date of birth of each child who is the subject of this proceeding are as follows [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act § 154-b(2) or Domestic Relations Law § 254]:

Name	Gender	Date of Birth	Current Address	Name of Person with Whom Child Resides
<u>Luisa Morales Martinez</u>	<u>female</u>	<u>8/20/2014</u>	<u>123 Main St</u>	<u>Gloria Martinez Navarro</u>
<u>Cristian Morales Martinez</u>	<u>male</u>	<u>5/10/2012</u>	<u>Albany, NY 12206</u>	

2. a. Petitioner, Hector, [check applicable box]: ☒ resides ☐ is located at [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act § 154-b(2) or Domestic Relations Law § 254]: 345 Broadway
Albany, NY 12206b. Petitioner is [specify relationship to child; if foster parent, agency, institution or other relationship, so state]: father3. a. Respondent, Gloria, [check applicable box]: ☒ resides ☐ is located at [specify address or indicate if ordered to be confidential, pursuant to Family Court Act § 154-b(2) or Domestic Relations Law § 254]: 123 Main St
Albany, NY 12206¹ Note: If a custody or visitation proceeding is pending in, or an order of custody or visitation has been issued by, a court outside of the State of New York, including a Native-American tribunal, the custody/visitation petition for proceedings under the Uniform Child Custody Jurisdiction and Enforcement Act, Form UCCJEA-1 should be utilized instead of this form. If a prior order of custody or visitation had been entered by a Court of this State, the petition for modification or enforcement, General Forms 40 or 41, should be used instead of this form.

b. Respondent is [specify relationship to child; if foster parent, agency, institution or other relationship, so state]: Mother

4. [Check box if applicable, or if not, SKIP to ¶5] (Upon information and belief) For any child listed in ¶(1) above who resided at the current address and/or with the current person for two years or less, specify where and with whom the child lived during the two years prior to that time [specify address or indicate if ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

Name of Child	Child's Address	Duration (from/to)	Name of Person With Whom Child Resided	Current Address of the Person With Whom Child Resided
Luisa Morales Martinez	345 Broadway Albany, NY 12206	birth to Nov. 2019	Hector	→ 345 Broadway
Cristian Morales Martinez		Nov. 2012 to Nov. 2019	Gloria	→ 123 Main St

5. [Applicable when Petitioner and/or Respondent is on active military duty or has recently returned from active military service; check box(es) if applicable, or if not, SKIP to Paragraph 6]:

a. ☐ Petitioner is on active duty, deployed or temporarily assigned to military service as follows [specify type of service, military branch or National Guard unit, anticipated dates and location of duty and how duty is likely to affect custody or visitation, if at all]:²

☐ Petitioner returned from active duty, deployment or temporary assignment to military service as follows [specify date of return, type of service, military branch or National Guard unit and how return from duty is likely to affect custody or visitation, if at all]:

b. ☐ Respondent is on active duty, deployed or temporarily assigned to military service as follows [specify type of service, military branch or National Guard unit and how return from duty is likely to affect custody or visitation, if at all]:³

☐ Respondent returned from active duty, deployment or temporary assignment to military service as follows [specify date of return, type of service, military branch or National Guard unit, anticipated dates and location of duty and how duty is likely to affect custody or visitation, if at all]:

6. [Check box(es) if applicable; or if not, SKIP to Paragraph 7]: ☐ An order was issued by Court, _____ County, State of _____, referring the issue of ☐ custody ☐ visitation to the Family Court of the State of New York in and for the County of [specify]:

7. [Check applicable box(es)]:

a. ☒ The father of the child(ren) who (is)(are) the subject(s) of this proceeding is [specify]: on the birth certificate

☐ The father was married to the child(ren)'s mother at the time of the conception or birth.

☐ An order of filiation was made on [specify date and court and attach true copy]:

² Inapplicable if Petitioner is based at a permanent duty station or has had a permanent reassignment of station.

³ Inapplicable if Respondent is based at a permanent duty station or has had a permanent reassignment of station.

☐ An acknowledgment of paternity was signed on [specify date]:
by [specify who signed and attach a true copy]:

☐ The father is deceased.

b. The father of the child(ren) who (is)(are) the subject(s) of this proceeding has not been legally established.

c. A paternity agreement or compromise, pursuant to former Family Court Act §516,⁴ was approved by the Family Court of _____ County on _____, _____, concerning [name parties to agreement or compromise _____ and child(ren)]:
A true copy of the agreement or compromise is attached to this petition.

8. [Applicable to cases in which either parent is not a party; check box if applicable, or if not, SKIP to Paragraph 9]: The name and address of a parent or parents who are not parties to this proceeding are: [specify; indicate if deceased or if address(es) ordered to be kept confidential pursuant to Family Court Act §154-b(2) or Domestic Relations Law §254]:

9. [Check box if applicable, or if not, SKIP to Paragraph 10]: Petitioner has participated as a ☐ party ☐ witness ☐ other capacity [specify]: _____ in other litigation concerning the custody of the same children in ☐ New York State ☐ Other jurisdiction [specify]:⁵
If so, specify type of case, type of participation, court, location and status of case.

10. a. A custody or visitation proceeding concerning the same child(ren) ☐ is ☐ is not pending in New York State. [If pending, give court docket number and status of case]:

b. A custody or visitation proceeding concerning the same child(ren) ☐ is ☐ is not pending in a jurisdiction outside New York State. [If pending, specify where, court docket number and status of case]:

11. [Check box if applicable, or if not, SKIP to Paragraph 12]: The custody or visitation of the child(ren) has been agreed upon in the following custody, separation or guardianship agreement, dated [specify, and attach copy]:

12. [Check box(es) if applicable, or if not, SKIP to Paragraph 13]:

a. ☐ Petitioner ☐ Respondent obtained custody of the child(ren) on [specify date]:
, as follows:

b. ☐ Petitioner ☐ Respondent obtained visitation with the child(ren) on [specify date]:
, as follows:

⁴ The agreement or compromise must have been signed prior to the repeal of FCA §516 on May 19, 2009.

⁵ If litigation occurred in Native-American tribunal, so indicate.

13. It would be in the best interests of the child(ren) for Petitioner to have ☒ custody ☐ visitation for the following reasons [specify]:

their mother has taken them away from me & tells them they can't see me because I'm a bad father. But she yells at them and sometimes leaves them home alone.

14. [Check box(es) if applicable, or if not, SKIP to Paragraph 15]:

a. An Order of Protection or Temporary Order of Protection was issued [check applicable box(es)]: ☐ against Respondent ☒ against me in the following criminal, matrimonial and/or Family Court proceeding(s) [specify the court, docket or index number, date of order, next court date and status of case, if available]:

0-12345-20
next date 2/4/20

The ☐ Order of Protection ☒ Temporary Order of Protection expired or will expire on [specify date]:

2/4/20

b. Petitioner requests a Temporary Order of Protection pursuant to Family Court Act §655 because [specify]:

15. [Applicable where one or more parties are not parents of the child(ren); if not, SKIP to Paragraph 16]: The subject child(ren) ☐ are ☐ are not Native-American child(ren) who may be subject to the *Indian Child Welfare Act* (25 U.S.C. §§ 1901-1963). If so, the following have been notified [check applicable box(es)]:

☐ parent/custodian [specify name and give notification date]:

☐ tribe/nation [specify name and give notification date]:

☐ United States Secretary of the Interior [give notification date]:

16. INSERT ADDENDUM where a child abuse, child neglect or destitute child petition and/or a permanency hearing report has been filed regarding the child(ren) and in which Petitioner is a Respondent parent, Non-respondent parent, relative or other non-parent; if not, SKIP to Paragraph 17].

17. No previous application has been made in any court, including a Native-American tribunal, or to any judge for the relief herein requested, (except:

WHEREFORE, Petitioner requests an order awarding ☒ custody ☐ visitation of the child(ren) to the Petitioner and for such other and further relief as the Court may determine.

Dated: 1/16/20

General Form 17 Page 5

Hector Morales

Petitioner

Hector Morales Ramirez

Print or type name

Signature of Attorney, if any

Attorney's Name (Print or Type)

Attorney's Address and Telephone Number

VERIFICATION

STATE OF NEW YORK)

):ss:

COUNTY OF Albany)

Hector Morales Ramirez being duly sworn, says that (s)he is the Petitioner in the above-named proceeding and that the foregoing petition is true to (his)(her) own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters (s)he believes it to be true.

Hector Morales

Petitioner

Sworn to before me this

day of Jan

(Deputy) Clerk of the Court

Notary Public



HUMANITARIAN FORMS OF RELIEF

PART I: U, T, VAWA

By Veronica Garcia

Noncitizen victims of violence, serious crimes, and persecution may be eligible for certain forms of immigration protection and status. These options are often referred to as Humanitarian Forms of Relief. They include: T nonimmigrant status, U nonimmigrant status, VAWA self-petition, asylum, and special immigrant juvenile status.

This practice advisory is one of two that will give an overview of these options, their eligibility requirements, and some factors to consider before applying. This advisory is meant to be an introduction to humanitarian forms of relief: U nonimmigrant status, T nonimmigrant status, and VAWA self-petition. This advisory should be used as general guidance, to identify potential eligibility, and to understand the processes and benefits of each form of relief. For a more detailed analysis on issues related to humanitarian forms of relief, please visit the Immigrant Legal Resource Center website at: <https://www.ilrc.org/u-visa-t-visa-vaaw>.

I. U Nonimmigrant Status:

U nonimmigrant status, often referred to as the “U visa,” is available to noncitizens who have been victims of serious crimes in the United States that resulted in substantial physical or mental harm. Individuals granted U status can remain lawfully in the United States, obtain employment authorization, and eventually apply for lawful permanent residence. The U visa was created so that noncitizen victims of crimes would not be afraid to report those crimes.

Law:

The law for U nonimmigrant status can be found in the INA at § 101(a)(15)(U) [definition of U nonimmigrant] and INA § 214(p) [miscellaneous U nonimmigrant requirements], and in the regulations at 8 CFR §§ 212.17, 214.14.

A. Eligibility for U Nonimmigrant Status:

1. Been the victim of a qualifying criminal activity;
2. Have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity;
3. Possess information concerning that criminal activity;
4. Have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal activity;
5. Have certification from a federal, state, or local law enforcement authority certifying their helpfulness in the detection, investigation, or prosecution of the criminal activity; and

6. The criminal activity violated the laws of the United States or occurred in the United States.

The key requirements for U nonimmigrant status are discussed in greater detail below.

Practice Note: U visas are capped at 10,000 per year, meaning no more than 10,000 can be granted per year. Many more U visa applications are currently pending beyond this limit, so there is an extensive backlog of U visa cases. Current estimated processing times for a U visa is about 10 years.

1. Victim of qualifying criminal activity:

A noncitizen may be eligible to apply for U nonimmigrant status if they have been a **victim of certain criminal activity**.

Qualifying criminal activity: Only individuals who have been victims of one of the crimes listed at INA § 101(a)(15)(U)(iii) or substantially similar crimes will be eligible to apply for a U visa. Some of the qualifying crimes include abusive sexual contact, domestic violence, involuntary servitude, kidnapping, manslaughter, obstruction of justice, rape, sexual exploitation, trafficking, witness tampering, and felonious assault.

The statute also allows for “other related crimes” to be considered, where the crimes are substantially similar. This is a recognition that not all state statutes classify crimes in the same way, so crimes with the same or substantially similar elements as those listed in the statute may still qualify for U eligibility, even if they are classified differently by a particular state.¹ There is no requirement that the crime be a felony (with the exception of felonious assault).

Victim: An applicant may be eligible to apply for U nonimmigrant status if they can show they were either a “direct” or “indirect” victim of a qualifying crime.²

Note: There are some overlaps between the different forms of relief discussed in this advisory. For example, someone who is a trafficking victim might also be eligible for T nonimmigrant status (discussed below). Remember that individuals can apply for multiple forms of relief and advocates do not have to pick just one. It is important to evaluate what the needs of the applicant, as well as facts, and see what option might be best for them.

A **direct victim** is an individual who is harmed as a direct result of the criminal activity.³ In limited cases, U.S. Citizenship & Immigration Services (“USCIS”) will consider an individual who can be classified as a “bystander victim” as a direct victim. A “bystander victim” is someone who experiences a direct harm because of the criminal activity, even if the act was not directed at them. The most common example USCIS uses to explain who a bystander victim is that of a woman who suffers a miscarriage as a result of witnessing a homicide or other serious, qualifying crime.

An **indirect victim** is the family member of a direct victim who is incompetent, incapacitated, or deceased. This includes spouses, unmarried children under 21 years of age, parents if the victim was under 21 years of age, and siblings under the age of 18, if the victim was under 21 years of age.⁴ The applicant will have to prove that the direct victim was incompetent or incapacitated in order for them to qualify as an indirect victim. USCIS will determine on a case-by-case basis if the direct victim was indeed incapacitated or incompetent. USCIS has stated that a minor victim (under age 18) is considered legally incompetent for this purpose, although in recent years the Vermont Service Center⁵ has been more restrictive in this determination. Indirect victimization can be an important way for parents of U.S. citizen (USC) children who have been victimized to qualify for this relief. It is important to screen when the USC child is harmed to see if the undocumented parent would qualify.

Example: David's wife Dana was killed during a home invasion robbery. Although David wasn't the victim of the murder, he is the spouse of a murder victim and can therefore be considered an indirect victim and apply for U nonimmigrant status so long as he meets all the requirements.

Example: Hortencia's 4-year-old son Elias was the victim of abusive sexual contact by another family member. Elias is a U.S. citizen so does not need to and cannot qualify for U nonimmigrant status. However, if Hortencia is helpful with the investigation and shows the harm she suffered from her son's victimization, she may qualify for U nonimmigrant status as an indirect victim because her son, the direct victim, lacks capacity due to his young age.

2. Substantial physical or mental abuse:

An applicant for U nonimmigrant status will need to show they have **suffered substantial physical or mental abuse** as a result of having been a victim of qualifying criminal activity. In determining if the abuse suffered was "substantial," USCIS will consider the severity of the injury suffered and the abuse inflicted. Some factors that will be considered include: nature of injury, severity of the perpetrator's conduct, severity of the harm suffered, duration of infliction of harm, and permanent or serious harm to appearance, health, physical, or mental soundness.⁶ No single factor will be used in determining the severity of the harm and a victim's past harm is taken into consideration when evaluating the current harm suffered. For example, a domestic violence victim's past abusive relationship can be considered when determining the impact of the recent domestic violence they suffered. Abuse will be considered in its totality, and USCIS recognizes that abuse may involve a series of acts or occur repeatedly over a period time.⁷ A victim's declaration will be key in showing the harm suffered, in addition to any medical records and case manager/social worker letters.

3. Cooperation with law enforcement:

An applicant will also have to show that they have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal activity.⁸ It is important to note that there is no requirement for the criminal investigation to lead to the prosecution of the perpetrator and it is enough that someone helped in the detection (i.e. reporting).⁹ A victim who is under 16 years of age, incompetent, or incapacitated does not have to meet this requirement.¹⁰ Age is determined for the victim on the day that the qualifying criminal activity occurred.¹¹

An applicant must submit a signed certification from a law enforcement agency.¹² This has to be on Form I-918 Supplement B, U Nonimmigrant Certification, signed by the head of the agency or an official designated by the head at a federal, state, or local enforcement authority.¹³ Unlike T nonimmigrant status (discussed below in section II), secondary evidence of cooperation is not accepted; the I-918 Supplement B certification is a mandatory requirement for all U applicants. Form I-918 Supplement B will need to state information concerning the qualifying criminal activity, how the victim was helpful, and a brief description of the harm suffered. Note that certifications are only valid for 180 days, therefore once a department returns the signed certification, applicants will only have six months to complete and submit their application, or else they will have to get a new signed certification.

B. Benefits of U Nonimmigration Status:

An applicant who is granted U nonimmigrant status will be in lawful status in the United States for four years¹⁴, be eligible for a work permit (employment authorization document, or "EAD"), and have access to public benefits. The time at which they become eligible for public benefits will depend on the state in which they reside.¹⁵

Deferred Action: If USCIS determines the applicant meets the basic U nonimmigrant eligibility requirements, they will place the applicant on a waitlist until a U visa becomes available, as many more people apply for U visas each year than the 10,000-annual cap on U visas. Some advocates refer to this as "conditional approval," because it does not guarantee that the applicant will ultimately be granted U nonimmigrant status, simply that the applicant has been found *prima facie*

eligible. Individuals on the U visa waitlist, however, are eligible for deferred action and a work permit, under category (c)(14).¹⁶ At the time of writing this advisory, U nonimmigrants are being approved for deferred action 4-5 years after submitting their application.

Deferred action is not lawful status¹⁷ and does not count towards the three years that are required before a U nonimmigrant can apply for lawful permanent residence. Deferred action is a determination that the applicant is a low priority for removal.

Derivatives: Applicants can include certain family members in their application as derivatives. Who they can include will depend on the applicant's age at the time of filing:

- If the applicant is under 21, they can include their spouse, unmarried children under 21, parents, and unmarried siblings under 18;
- If the applicant is 21 or older, they can include their spouse and unmarried children under 21.

Derivatives do not age out. A derivative's age is determined at the time the principal applicant files their application. Derivatives must remain unmarried until the U nonimmigrant status is granted.

Note: Principal U applicants can add derivatives after they have filed their U application and even after they have been granted U nonimmigrant status by submitting a derivative application with proof of the principal's U nonimmigrant filing.¹⁸

Waivers: Applicants for U nonimmigrant status will have to show they are admissible into the United States or demonstrate they are eligible for a public interested waiver of any applicable inadmissibility ground. A waiver is available under INA § 212(d)(14) that allows USCIS to grant the waiver if in the "public or national interest." A U nonimmigrant applicant may apply for a waiver of any of the inadmissibility grounds except for those in INA § 212(a)(3)(E), related to perpetrators and participants of Nazi persecution, genocide, acts of torture or extrajudicial killing.¹⁹ U nonimmigrant applicants can also apply for a general waiver under INA § 212(d)(3).

Pathway to Lawful Permanent Residence: Individuals can apply for lawful permanent residence after three years in U nonimmigrant status. To apply, they will need to show that they have been physically present in the United States for a continuous period of at least three years in U nonimmigrant status, did not unreasonably refuse to provide assistance to law enforcement, are not inadmissible under INA § 212(a)(3)(E), and their continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.²⁰

The rest of the inadmissibility grounds under INA § 212(a) do not apply to U nonimmigrants at time of adjustment of status, however USCIS might still consider negative factors as a matter of discretion. Therefore, in cases with negative factors, such as criminal issues or immigration violations, it is important to provide evidence of positive equities to counterbalance.

C. Considerations Before Applying for U Nonimmigrant Status:

- There is no requirement for the victim and the perpetrator to be related to one another, or that the perpetrator have immigration status. Compare with VAWA (discussed in section III of this advisory), where the perpetrator must be a U.S. citizen or LPR and have a specific relationship with the victim.
- There is no deadline for applying; so long as the crime was reported and law enforcement certifies, an applicant can submit a U nonimmigrant status petition at any time, even years after the crime occurred.
- Wait time for U nonimmigrant status is extremely long—as of June 2019 the wait for initial review was four years or longer. This initial determination may result in an applicant being granted deferred action and issued work authorization while they wait for a final decision on their case (which takes years, as well).

- Given the cap on U visas and the long waitlist, it may be worthwhile to consider applying for T nonimmigrant status instead of U nonimmigrant status, as there is some overlap of qualifying criminal activity between these two forms of relief.

II. T Nonimmigrant Status:

T nonimmigrant status, often referred to as the “T visa,” is a nonimmigrant status that allows noncitizen survivors of severe forms of human trafficking to remain lawfully in the United States, obtain employment authorization, and eventually apply for lawful permanent residence. The T visa was created to combat human trafficking and provide immigration relief for persons who were trafficked into the United States.

Law:

The law for T visas can be found in the Immigration and Nationality Act (INA) at INA § 101(a)(15)(T) [definition of T nonimmigrant] and INA § 214(o) [miscellaneous T nonimmigrant requirements] and the implementing regulations at 8 CFR §§ 212.16, 214.11.

A. Eligibility Requirements for T nonimmigrant status:

Eligibility Requirements for T nonimmigrant status:²¹

1. Is or has been the victim of a severe form of trafficking;
2. Is physically present in the United States, a U.S. territory,²² or at a port of entry on account of trafficking. This includes a survivor who was allowed to enter the United States to participate in the investigative or judicial processes associated with the trafficking;
3. Can demonstrate that they complied with any reasonable request for assistance in the federal, state, or local investigation or prosecution of acts of trafficking or the investigation of a crime where acts of trafficking are at least a central reason for the commission of that crime UNLESS they qualify for an exemption or exception to this requirement;
4. Would suffer extreme hardship involving unusual and severe harm upon removal from the United States.

Each of these requirements is discussed in greater detail below.

1. Severe form of trafficking:

An individual is considered to be a victim of human trafficking if they have been induced to participate by “force, fraud, or coercion” in either of the following:

- **Sex Trafficking:** a commercial sex act induced by force, fraud, or coercion OR in which the person induced to perform such an act is under 18 years of age;²³
- **Labor Trafficking:** 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.²⁴

Note that commercial sex acts involving minors do not need a showing of force, fraud, or coercion. This is not the case for labor trafficking cases, regardless of age.

When proving trafficking, it is important to outline the process used, the means used, and the end results. Consider the following questions:

- **Process:** was it done by recruiting, harboring, transporting, providing, or obtaining a person for labor?
- **Means:** was force, fraud, or coercion used against the survivor?

- **Purpose:** was the objective the survivor’s involuntary servitude, peonage, debt bondage, slavery, or commercial sex?

Example: Jiachiang left Fujian province in China with a smuggler, known as a “snakehead,” with the understanding that he would have work in New York City. He began to work at a Chinese restaurant in New York City, where he slept in the back. The owners demanded long hours and only paid him \$100 a week. When he said he wanted to quit, they threatened to hurt his family members back in China if he left and throw him in jail if he said anything to anyone. Here, Jiachiang might be eligible for T nonimmigrant status due to labor trafficking because he became subject to involuntary servitude when he was coerced into staying at a job because of the threats made to him and his family.

2. Physically present on account of the trafficking:

T nonimmigrant applicants must be physically present in the United States, a U.S. territory, or a port of entry “on account of the trafficking.” The applicant must also be physically present in the United States at the time the application is received by U.S. Citizenship and Immigration Services (USCIS).²⁵ “On account of” is interpreted to include those individuals currently in a trafficking situation, those who have been released from trafficking situations, and those who escaped a trafficking situation. It is important to note that USCIS is heavily scrutinizing this element and it can be harder for applicants who have been here for many years after escaping the trafficking incident to prove that they are still present “on account of” the trafficking situation. A departure, even if it is brief and to visit a family member, will break the applicant’s “physical presence” in the United States. Individuals who return to the United States will have to show that their return is related to the trafficking (either re-victimization, victim of a new incident, or to help in the investigation).²⁶

There is a common misconception that only individuals who were trafficked into the country are eligible for this relief. However, crossing an international border is not required to demonstrate that someone is a victim of a severe form of human trafficking. Some survivors of trafficking came to the country on their own, either on a visa or without status, and were trafficked once inside the United States.

Example: Mai came to the U.S. as a young girl with her family and has no immigration status. Mai’s boyfriend began pimping her out when she was 16 years old. He said with the money she earned they could start a life together. When she didn’t want to do it anymore, he threatened to tell everyone that she was a “slut.” He also threatened to break up with her and warned her that his buddies in the gang were depending on her to help earn them some money.

Mai could potentially be eligible as a victim of sex trafficking. Mai came to the United States many years ago with her parents and was later pimped by her boyfriend. Mai is present in the United States as an individual who is currently being trafficked by her boyfriend. It does not matter that she entered for another reason.

3. Complied with a reasonable request made by law enforcement agency:

To qualify for T nonimmigrant status, a victim must show that they contacted law enforcement regarding the trafficking, unless an exception applies, and have complied with any reasonable request from law enforcement. They need only show they reached out to law enforcement, not that law enforcement responded or acted on the information. A person who never contacted law enforcement regarding the trafficking will not be eligible unless they meet exceptions outlined below.²⁷ USCIS will look at several factors when determining if a request was reasonable. This includes, but is not limited to, general law enforcement agency practices, nature of the victimization, specific circumstances of the victim, severity of trauma suffered or whether the request would cause further trauma.²⁸

Unlike the process for U nonimmigrant status, certification of cooperation by a law enforcement agency is not required to prove cooperation but when possible, it is good to try and obtain certification. Instead, or in addition, applicants can

show cooperation through their efforts to contact law enforcement officials, their own declaration stating who they attempted to contact, email correspondence, photocopies of business cards of law enforcement officials, declarations by case managers and other witnesses of efforts to cooperate with law enforcement.²⁹

An applicant must comply with any reasonable request by a law enforcement agency from the time of the initial application through the time they apply for lawful permanent residence (also referred to as “LPR” status or a “green card”) through adjustment of status.

Exceptions:

- a. Minors: applicants who are under 18 years of age are exempt from complying with reasonable request for cooperation.³⁰
- b. Trauma: applicants over the age of 18 who are unable to cooperate due to physical or psychological trauma may qualify for an exception from this requirement.³¹ An applicant will need to submit evidence of the trauma to meet this requirement. For example, a declaration describing the trauma, a signed statement from a doctor or case worker describing their mental state or a psychological evaluation, and/or medical records documenting the trauma.³²

4. Extreme hardship upon removal:

Lastly, applicants for T nonimmigrant status will have to show that they will suffer extreme hardship involving unusual and severe harm if removed. Some factors that will be considered include: age, maturity, and personal circumstances of the applicant; physical or psychological issues of the applicant that necessitate medical or psychological care not reasonably available in the foreign country; nature and extent of the physical and psychological consequences of the trafficking; impact of loss of access to the United States court system; social practices or customs in the foreign country that would punish the applicant for having been trafficked; likelihood of re-victimization; and vulnerability to harm by the trafficker.³³

Applicant declarations are key to show the extreme harm that would be suffered if removed. Additionally, applicants can use medical records, affidavits from witnesses, and statements from case managers, social workers, or family members. Applicants should also include documentation on country conditions to illustrate the lack of access to resources or support as well as any stigma that might exist from being a victim of trafficking.

B. Benefits of T Nonimmigrant Status:

T nonimmigrant status lasts for four years³⁴ and allows a grantee to apply for work authorization. T nonimmigrants also have access to both state and federal public benefits.³⁵ Additionally, T nonimmigrants can apply for lawful permanent residence after three years in T nonimmigrant status.

Derivatives: Applicants for T nonimmigrant status can include certain family members as derivatives in their application. Who they can include will depend on the applicant’s age:

- Applicants who are under 21 can include their spouse, unmarried children under 21, parents, and unmarried siblings under 18.
- Applicants who are 21 or older can include their spouse and unmarried children under 21.

Applicants can also include certain family members, regardless of the applicant’s age, if these family members are in present danger of retaliation as a result of escaping trafficking or cooperating with law enforcement:

- Parents;
- Unmarried siblings under 18 years of age; and

- Children of any age or marital status of qualifying family members who have been granted derivative T nonimmigrant status.

Waivers: T nonimmigrant applicants must also be “admissible,” meaning that they do not fall under any of the applicable grounds of inadmissibility at INA § 212(a) or if they do, they have been granted a waiver. The public charge ground of inadmissibility at INA § 212(a)(4) does not apply to T nonimmigrants,³⁶ so no waiver is needed for this ground. For the grounds that do apply, many are waivable for T nonimmigrant applicants if they can show it was incident to or caused by the victimization and if in the national interest. The only grounds that cannot be waived are security-related, international child abduction, and renunciation of U.S. citizenship to avoid taxation.³⁷ T nonimmigrants can apply for two different waivers: a T-specific waiver, at INA § 212(d)(13), and a general nonimmigrant waiver, at INA § 212(d)(3).

Pathway to Lawful Permanent Residence: Individuals granted T nonimmigrant status are eligible to apply for lawful permanent residence after three years under INA §245(l). To apply for a green card based on T nonimmigrant status, they will have to show that they have been physically present in the United States for a continuous period of at least three years in T nonimmigrant status,³⁸ are a person of good moral character, complied with any reasonable request from law enforcement (or meet one for the exemptions), and are admissible to the U.S.³⁹ Applicants will need to show they are not inadmissible under INA § 212(a). Applicants may have been granted a waiver for certain grounds at the T application phase and may seek a waiver when adjusting status for any ground that has not already been waived.

C. Considerations Before Applying for T Nonimmigrant Status:

- Remember, a person does not have to be trafficked *into* the U.S. in order to qualify for the T Visa—a person can also be trafficked within the U.S. after entering the country and be eligible for T nonimmigrant status.
- A trafficked individual’s initial consent is irrelevant—a person who initially consents may be considered to have been trafficked because of the trafficker’s coercive or deceptive conduct and the subsequent exploitation.
- There are no filing deadlines for victims trafficked after October 28, 2000. USCIS will accept an application for T nonimmigrant status even if the applicant was victimized years ago.
- Applicants can include various kinds of evidence to show cooperation with law enforcement, as a formal law enforcement certification is not required. Furthermore, minors do not need to meet the cooperation requirement.
- There is a 5,000-visa cap for T nonimmigrant status that has never been reached and thus there is no wait (beyond the amount of time it takes to adjudicate the application) at this time. This is in stark contrast to the U nonimmigrant status, see section I.

III. VAWA self-petition:

The Violence Against Women Act (VAWA), first enacted in 1994, was created to address a widespread problem of abused noncitizens staying with their abusers because the abuser held a key role to the victim attaining lawful immigration status in the United States. The VAWA self-petition process mirrors the family-based process but frees the victim from having to rely on the abuser’s cooperation to petition for them, as they can proceed with the family-based immigration process without the abuser’s knowledge or involvement. Under VAWA an abused spouse or child of a lawful permanent resident (LPR) or U.S. citizen (USC), or an abused parent of a USC son or daughter (age 21 or older), can submit a self-petition on their own behalf.

Law:

The law for a VAWA self-petition can be located in INA § 204(a)(1)(A) and in the regulations at 8 CFR § 204.1.

A. Eligibility for VAWA Self-Petition:

VAWA self-petitions can benefit abused men *and* women, abused children and parents, and abused spouses, including same sex couples who are legally married.

The eligibility requirements for VAWA self-petition:⁴⁰

1. They are the abused spouse or child of a USC or LPR, or an abused parent of a USC son or daughter;
2. The abuser was an LPR or USC;
3. They were the victim of battery or extreme cruelty;
4. They resided with the abuser in the United States at some point;
5. They can demonstrate good moral character; and
6. Self-petitioning spouses must show they entered into the marriage in good faith.

See below for a discussion of the main requirements.

1. Qualifying family relationship:

Unlike other forms of relief described in this advisory, VAWA self-petitioners must show a familial relationship to the abuser and that the abuser had status. Spouses and children of LPRs or USCs and parents of adult USCs are eligible to self-petition. It is important to understand how these terms are defined in immigration law before applying.

Spouses: Abused spouses of USCs or LPRs can qualify to submit a VAWA self-petition.⁴¹ The abused spouse will have to prove that the abuser is or was a USC or LPR, that they are legally married (or were married and are recently divorced, in some circumstances, see below), and that the marriage was entered into in “good faith.”⁴²

Status of Abuser: The abuser must be an USC or LPR for the applicant to qualify for VAWA. If the abuser lost their status because of the abuse, the self-petitioner can still qualify so long as they submit the self-petition within two years of the abuser’s loss of status.⁴³ The abuse to the noncitizen could have been before the abuser gained status BUT note that the abuser has to have gained status before a divorce is finalized in order for the individual to be eligible to self-petition.

Marriage: The abused individual must be legally married to the USC or LPR abuser. A marriage is considered legal if it is valid in the place where the ceremony was performed. This includes both common law marriages, where recognized,⁴⁴ and same sex marriages. An applicant could be divorced from the abuser and still qualify so long as they can show the divorce was connected in some way to the abuse and they file their self-petition within two years of the divorce⁴⁵ (this can also include annulments⁴⁶). Applicants cannot remarry until their self-petition is approved.

In the case of the abusive spouse’s death, an abused spouse of a USC can still file their self-petition within two years of the abuser’s death.⁴⁷ This is *not* the case for the spouse of an LPR, unless the petition was already pending when the abuser passed away.⁴⁸ An abused spouse who thought they were legally married but in fact were not, such as in the case when the abuser was already legally married to someone else and the self-petitioner was unaware of the other marriage, can still self-petition.

Example: Maribel’s husband abused her for years before she was finally able to flee to a friend’s house. Maribel later learns that he became an LPR. Though Maribel no longer lives with her abuser, she may qualify for a VAWA self-petition because she is married to an LPR; it does not matter that she was abused by him when he was undocumented. The abuser need not be an LPR during the abuse (although the abuse must have taken place during the marriage), *but* the applicant must be married to the abuser at time of filing or have been a spouse of an LPR within the past 2 years, if now divorced. Maribel was

abused and is still the spouse of an LPR, therefore she may qualify to file a VAWA self-petition if she meets all the other requirements.

Marriage Entered Into in Good Faith: The marriage must have been entered into in good faith and not solely for the purpose of obtaining immigration status. Although there is no exact definition for what makes a good faith marriage, courts have identified some factors like whether the couple intended to establish a life together at the time of the marriage.⁴⁹

It is important to note that a *non-abused* spouse of a USC or LPR, whose child was abused by the USC or LPR spouse, can also qualify to file a self-petition under VAWA.⁵⁰

Children: For a child to be eligible to self-petition, they must show that they meet the definition of a “child” in immigration law. A “child” is defined as unmarried and under 21 years of age.⁵¹ There are other requirements, having to do with whether the child was born in wedlock or legitimated, and whether the child is a step-child or adopted child, that can be located at INA § 101(b)(1). An abused child of an LPR or USC can submit a VAWA self-petition.⁵² The self-petitioning child does not have to be in the abuser’s legal custody at the time of the VAWA self-petition and any changes in parental rights will not affect the child’s ability to self-petition.⁵³

A child who is over 21 and was eligible to self-petition but did not, can still file a VAWA self-petition so long as they do so before turning 25 and are unmarried at the time the self-petition is filed. They will have to show that the abuse was “at least a central reason” for the filing delay.⁵⁴ Additionally, the self-petitioner must have met all the qualifying factors for filing a VAWA self-petition before they turned 21. If the abuse took place after they turned 21, they do not qualify for VAWA as an abused “child.”

A non-abused child of an abused spouse or child qualifies for VAWA if they are listed on the abused spouse’s or child’s self-petition as a derivative.⁵⁵

Parents: An abused parent of a USC son or daughter (a “son or daughter” is defined as a child who is now 21 years or older) may also qualify to submit a VAWA self-petition.⁵⁶ The parent will need to show that the qualifying relationship existed at the time of the abuse and at the time of filing.⁵⁷ Unlike spouse and children VAWA self-petitions in which the abuser can be either a USC or an LPR, parents are only eligible to submit a VAWA self-petition if their abuser is a USC, because that is the only situation in which an adult child could file a petition for their parent (as an immediate relative); there is no visa category for an LPR son or daughter to petition for their parent and thus the abused parent of an LPR son or daughter cannot self-petition under VAWA—recall that VAWA does not create any new visa categories, it just allows abused family members to assume the role that the abusive petitioner could have occupied.⁵⁸ If the abusive USC son or daughter lost status or died, the parent can submit a petition within two years of the loss of status or death.⁵⁹

2. Subjected to “battery or extreme cruelty”:

For VAWA, an applicant needs to show that they were the victim of battery or extreme cruelty. However, unlike U and T nonimmigrant status, law enforcement need not have been involved or contacted regarding the abuse. There is no set list of factors to determine what battery or extreme cruelty is. In fact, the definition of abuse is flexible and broad enough to include physical, sexual, and psychological acts, as well as economic coercion.⁶⁰ Battery can include, but is not limited to, an act of violence that results in injury. This can also include threats of violence, even if they do not result in physical harm.⁶¹ When evaluating what is battery or extreme cruelty, USCIS can take into consideration acts that might amount to battery or extreme cruelty when viewed as part of an overall pattern of violence, even if they might seem minor in isolation.⁶² There is no exhaustive list of acts that are considered “battery or extreme cruelty” and examples can include social isolation; accusations of infidelity; incessantly calling, writing, or contacting the victim; interrogating the victim’s friends; threats; economic abuse including not allowing the victim to work and controlling all their money; and degrading the victim.

Example: Jon is married to Dany, a U.S. citizen. Dany promised Jon that he would help him get a green card. Dany began to fill out the forms for Jon, but he never filed them. For the past year, Dany has been isolating Jon from his friends and family. He does not allow Jon to have any money without his permission and forbids him to leave the house without him. About a month ago, while Dany was at work, Jon went to help a sick friend. Dany came home early and was waiting at the house when Jon returned. He yelled at him, threatening to turn him in to immigration authorities and have him deported. Dany kicked Jon's beloved dog severely several times until Jon begged him to stop. This is not the first time Dany has mistreated his dog. Because of his husband's controlling behavior and mistreatment, Jon became depressed and despondent. Dany's behavior should qualify as extreme cruelty to Jon, potentially allowing Jon to file a VAWA self-petition.

3. Residence Requirements:

An applicant for VAWA must have lived with the abuser at some point, either inside or outside the United States. There is no specific timeframe for how long the victim has to live with the abuser in order to qualify; an applicant can qualify even if they only lived with the abuser for a short time.⁶³ There is also no requirement that the self-petitioner continue to live with the abuser to be eligible for VAWA.

Example: Marta married Jose in Venezuela. Jose is a lawful permanent resident. Marta went to the United States to live with Jose, but he subjected her to domestic abuse, and she fled to a friend's house shortly after joining Jose in the United States. Marta can self-petition, even though she no longer lives with Jose because she suffered domestic violence while living with him in the United States.

In addition to having lived with the abuser at some point, a VAWA self-petitioner does not have to presently reside in the United States in order to be able to file a VAWA self-petition, but the abuse generally must have occurred while in the United States (unless the abusive spouse is an employee of the U.S. government or a member of the U.S. armed services).⁶⁴

4. Good moral character:

An applicant for VAWA must establish that they are a person of "good moral character" for the three years prior to filing their self-petition.⁶⁵ There is no clear definition in immigration law for good moral character but there is a list of acts that would bar a person from establishing good moral character at INA § 101(f). Some of the things that would bar someone from establishing good moral character are things like being declared a habitual drunk, engaging in prostitution, smuggling people into the country, certain drug convictions, and being incarcerated for an aggregate period of 180 days or more as a result of a conviction.⁶⁶ A person is only barred if they fall within any of these for the time period for which they are required to show good moral character. However, there are special exceptions for VAWA self-petitioners to these good moral character bars if the act or conviction is waivable with respect to the self-petitioner for purposes of determining whether the self-petitioner is admissible or deportable or the act or conviction was connected to the abuse suffered by the self-petitioner.⁶⁷

The applicant's declaration, in which they detail their eligibility for VAWA, is their primary evidence of good moral character. In addition, applicants should submit police clearances from each place where they resided for six months or more during the past three years.

Children under 14 years of age are presumed to have good moral character and will not be required to submit evidence of good moral character.⁶⁸ If the child is 14 or older, the rules are the same as for an adult self-petitioner.

B. Benefits of VAWA Self-Petition:

A self-petitioner who meets the basic eligibility requirements will get a notice of “prima facie” eligibility within a few months of filing which they can use to access public benefits like Medicare.

Generally, an applicant whose VAWA self-petition is granted will be given deferred action while they wait to complete the process for lawful permanent residence and will be eligible for a work permit (EAD) and public benefits.

Derivatives: A self-petitioning spouse or child can include their children who are unmarried and under 21 years of age, including adopted children and stepchildren, as derivatives.⁶⁹ It does not matter for derivatives that they were not actually abused. Once a child is included, they will not lose VAWA benefits when they turn 21 years old. Instead, when they turn 21 they become self-petitioners in their own right and their visa category will change from that of an “unmarried child” to one of an “unmarried son or daughter.”⁷⁰ Similarly, if a child of a USC abuser marries, they will automatically move to the third preference visa category for married sons or daughters of U.S. citizens.⁷¹ This mirrors the regular family-based visa categories and movement between categories.

Self-petitioning parents of USCs *cannot* include derivatives.

Waiver: A VAWA self-petitioner does not need to establish that they are admissible when they file their self-petition. However, once a VAWA self-petitioner goes on to file their application for permanent residence—which they may be able to do at the same time as filing the self-petition if they are an immediate relative⁷², otherwise they need to wait for their preference petition to be current—they must establish that they are not inadmissible under any of the applicable inadmissibility grounds or else eligible for a waiver. In addition to the standard waivers available for various grounds of inadmissibility at INA 212(h) and INA 212(i), there are special VAWA waivers, exceptions, or exemptions for some of the grounds of inadmissibility.⁷³

Pathway to Lawful Permanent Residence: A VAWA self-petitioner will be eligible to apply for lawful permanent residence through adjustment of status under INA § 245(a), or consular processing. Similar to a family petition, a self-petitioner can submit their application for LPR status when an immigrant visa becomes available for their family-based classification, either as an immediate relative or one of the preference categories. This may be immediately for spouses, children (unmarried and under 21), and parents (whose USC sons or daughters are 21 or older) of USCs or may take several years for spouses and children of LPRs. Self-petitioners can use the State Department’s Visa Bulletin to calculate when a visa is likely to become available for their preference category.⁷⁴

As mentioned above in the discussion of VAWA waivers, at time of applying for lawful permanent residence, applicants must prove that they are not inadmissible under INA § 212(a). There are certain VAWA-specific waivers as well as general waivers that an applicant can submit to waive some of the grounds of inadmissibility.

C. Considerations Before Filing a VAWA Self-Petition:

- Applicants must have a familial relationship to the abuser—i.e. a legal marriage to the abuser, be the parent of the abuser, or the child of the abuser. A U visa might be an option where there is no legal relationship to the abuser.
- The abuser must be an LPR or USC. If they lost that status, the applicant must submit their self-petition within two years of the abuser losing their status. U nonimmigrant status might be an option where the abuser had no status or only a form of temporary status.
- Unlike with the U or T nonimmigrant status, with VAWA there is no requirement that the victim cooperate with or even contact law enforcement. A self-petitioner’s detailed declaration may be sufficient proof, by itself, of the abuse.

- VAWA self-petitioners can apply to adjust under INA § 245(a), even if they were not inspected and admitted or paroled.
- The bars to adjustment under INA § 245(c), such as failure to maintain lawful status or working without authorization, do not apply to VAWA self-petitioners.⁷⁵

IV. Conclusion

The above is only a brief overview of what makes a person eligible for these humanitarian forms of relief. It is important to research each immigration option thoroughly before submitting an application and to consult immigration experts for any complex cases, especially in light of recent changes in policy and procedure within the Department of Homeland Security and Immigration Courts. Below is a list of resources to support advocates in exploring and pursuing these legal options with clients.

V. Resources

- For technical assistance when filing these applications:
 - T, U, and VAWA: ILRC Attorney of the Day Technical Assistance, <https://www.ilrc.org/technical-assistance>
 - U and VAWA: ASISTA, http://www.asistahelp.org/en/access_the_clearinghouse/trafficking_and_t_visas/
 - T visas: Coalition to Abolish Slavery & Trafficking (CAST), <http://www.castla.org/training>
- For U visa certification information, the U Visa Certifier Database created by the Immigration Center for Women and Children (ICWC) gives access to certifier information across the United States. Individuals will need to subscribe in order to get access to the site. More information on how to register can be found at <https://www.icwclaw.org/icwc-u-visa-zoho-database>.
- To refer clients to free or low-cost legal service providers:
 - National Immigration Legal Services Directory: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>
- For information on access to public benefits: the National Immigration Law Center (NILC), www.nilc.org/accesstobens.html
- USCIS has issued various policy memos on U and T nonimmigrant status, as well as VAWA. See the USCIS website at <https://www.uscis.gov/>
 - Recently, USCIS released a new policy regarding when they will issue Notices to Appear (NTA) for applications that are denied when the applicant has no other lawful status, among other scenarios. For more information on how this new memo impacts U, T, and VAWA cases visit: <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>
- USCIS is planning to make changes fee waivers in the coming months that may make it harder for applicants to apply if they cannot afford to pay the immigration filing fee. Note that although there is no fee for T nonimmigrant and U nonimmigrant applications, there is a fee for the waivers of inadmissibility. Currently, U and T nonimmigrants and VAWA self-petitioners are eligible for a fee waiver for all immigration applications. Visit the ILRC website for up-to-date information on changes to the fee waiver at <https://www.ilrc.org/>.

End Notes

¹ INA §101(a)(15)(U)(iii).

² 8 CFR § 214.14(a).

³ 8 CFR § 214.14(a)(14).

⁴ 8 CFR § 214.14(a)(14)(i).

⁵ Vermont Service Center processes U nonimmigrant status applications.

⁶ 8 CFR § 214.14(b)(1).

⁷ See Preamble at Federal Register, Vol. 72, No. 179, p. 53016-53017 (Sept. 17, 2007).

⁸ INA §101(a)(15)(U)(i)(II).

⁹ U.S. Department of Homeland Security, U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, December 29, 2011 and “Centralization of Interim Relief for U Nonimmigrant Status Applicants,” William R. Yates, Assoc. Dir. of Operations, USCIS (Oct. 8, 2003) at p. 4. This memorandum may be found on the USCIS website at www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2003/ucntrl100803.pdf.)

¹⁰ 8 CFR § 214.14(b)(3).

¹¹ *Id.*

¹² 8 CFR § 214.14(a)(5).

¹³ 8 CFR § 214.14(a)(3).

¹⁴ In certain circumstances, applicants are able to extend their nonimmigrant status. For more information on this see USCIS Policy Memorandum *Extension of Status for T and U Nonimmigrants (Corrected and Reissued)* (October 2016), available at <https://asistahelp.org/wp-content/uploads/2018/02/T-and-U-Extension-October42016.pdf>.

¹⁵ Some states will allow U nonimmigrant status applicants to apply for public benefits once they have received deferred action. Others, like California, will allow applicants of U nonimmigrant status to access public benefits once they receive their receipt notice

¹⁶ 8 CFR § 214.13(d)(2).

¹⁷ Deferred action is considered “lawful presence” instead. This means that a U applicant with deferred action will not accrue “unlawful presence” during the period of deferred action. 8 CFR 214.14(d)(3).

¹⁸ 8 CFR § 214.14(f).

¹⁹ INA § 212(d)(14).

²⁰ INA § 245(m); 8 CFR § 245.24

²¹ INA §101(a)(15)(T)

²² U.S. Territories include American Samoa, or the Commonwealth of the Northern Mariana Islands

²³ TVPA, § 103(8); 22 USC § 7102(9).

²⁴ *Id.*

²⁵ 8 CFR § 214.11(g)(1).

²⁶ 8 CFR § 214.11(g)(2).

²⁷ 8 CFR § 214.11(h)(1).

²⁸ 8 CFR § 214.11(h)(2).

²⁹ 8 CFR § 214.11(h)(3).

³⁰ TVPRA, § 4(b)(1)(A); INA § 101(a)(15)(T)(III); 8 USC § 1101(a)(15)(T)(i)(III); 8 CFR § 214.11(h)(4)(ii).

³¹ INA § 101(a)(15)(T)(iii); 8 CFR § 214.11(h)(4)(i).

³² 8 CFR § 214.11(h)(4)(i).

³³ 8 CFR § 214.11(i)(2).

³⁴ In certain circumstances, applicants are able to extend their nonimmigrant status. For more information on this see USCIS Policy Memorandum: *Extension of Status for T and U Nonimmigrants (Corrected and Reissued)* (October 2016), available at <https://asistahelp.org/wp-content/uploads/2018/02/T-and-U-Extension-October42016.pdf>.

³⁵ Note that some states give T applicants access to some public benefits even before they are granted T Nonimmigrant Status. The public benefits they will have access to depends on the state of residency and some states will accept their USCIS receipt notice to allow access.

³⁶ INA § 212(d)(13)(A).

³⁷ INA § 212(d)(13)(B)(ii).

³⁸ Any departures from the USA for more than 90 days or for any periods exceeding 180 days in the aggregate will cut off continuous presence.

³⁹ INA § 245(l); 8 CFR § 245.23(a).

⁴⁰ INA § 204(a)(1)(A).

⁴¹ INA § 204(a)(1)(A)(iii) (spouse of USC) and INA § 204(a)(1)(B)(ii) (spouse of LPR).

⁴² INA § 204(a)(1)(A)(iii).

⁴³ INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(bbb).

⁴⁴ Common law marriage is recognized in DC, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah.

⁴⁵ INA § 204(a)(1)(B)(ii)(II)(aa)(CC)(ccc).

⁴⁶ See Aleinkoff, Executive Associate Commissioner, Office of Programs, “Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents,” (April 16, 1996),

⁴⁷ INA § 204(a)(1)(A)(iii)(II)(aa)(CC)(aaa).

⁴⁸ INA § 204(l).

⁴⁹ *Lutwak v. United States*, 344 U.S. 604, 611 (1953); *Bark v. INS*, 511 F.2d 1200 (9th Cir. 1975); *Matter of Soriano*, 19 I&N Dec. 764, 765 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1, 2-3 (BIA 1983); *Matter of McKee*, 17 I&N Dec. 332, 334 (BIA 1980).

⁵⁰ INA § 204(a)(1)(A)(iii) (spouse of USC) and INA § 204(a)(1)(B)(ii) (spouse of LPR).

⁵¹ INA § 101(b)(1).

⁵² INA § 204(a)(1)(A)(iv) (child of USC) and INA § 204(a)(1)(B)(iii) (child of LPR).

⁵³ 8 CFR § 204.2(e)(1)(ii).

⁵⁴ INA § 204(a)(1)(D)(v).

⁵⁵ INA § 204(a)(1)(A)(iv) and INA § 204(a)(1)(B)(iii).

⁵⁶ INA § 204(a)(1)(A)(vii).

⁵⁷ See USCIS Policy Memorandum, “Eligibility to Self-Petition as a Battered or Abused Parent of a U.S. Citizen,” PM-602-0046, August 30, 2011 [hereinafter USCIS, Parent Memorandum].

⁵⁸ INA § 204(a)(1)(A)(vii).

⁵⁹ INA § 204(a)(1)(A)(vii)(I).

⁶⁰ 8 CFR § 204.2(c)(1)(vi) [abused spouses]; 8 CFR § 204.2(e)(1)(vi) [abused children].

⁶¹ 8 CFR § 204.2(c)(1)(vi).

⁶² 8 CFR § 204.2(c)(1)(vi).

⁶³ INA § 204(a)(1)(A)(iii)(II)(dd) [spouses and intended spouses of U.S. citizens]; INA § 204(a)(1)(A)(iv) [children of U.S. citizens]; INA § 204(a)(1)(B)(ii)(II)(dd) [spouses and intended spouses of lawful permanent residents]; INA § 204(a)(1)(B)(iii) [children of lawful permanent residents].

⁶⁴ INA § 204(a)(1)(A)(v) [spouses, intended spouses, and children of U.S. citizens]; INA § 204(a)(1)(B)(iv) [spouses, intended spouses, and children of lawful permanent residents].

⁶⁵ The USCIS may also investigate the self-petitioner’s background beyond the three-year period to determine good moral character, “*when there is reason to believe* that the self-petitioner may not have been a person of good moral character during that time” (emphasis added). See USCIS *Interoffice Memorandum: Determinations of Good Moral Character in VAWA-Based Self-Petitions Purpose* (January 19, 2005) available at <https://asistahelp.org/wp-content/uploads/2018/10/USCIS-Memo-Determination-of-GMC-in-VAWA-January2005.pdf>.

⁶⁶ INA § 101(f).

⁶⁷ INA § 204(a)(1)(C).

⁶⁸ 8 CFR § 204.2(e)(2)(v).

⁶⁹ INA § 204(a)(1)(A)(iii) [children of abused spouses and intended spouses of U.S. citizens]; INA § 204(a)(1)(B)(ii) [children of abused spouses and intended spouses of lawful permanent residents].

⁷⁰ INA § 204(a)(1)(D)(i)(III).

⁷¹ INA § 204(a)(1)(D)(i)(I).

⁷² INA § 201(b)(2)(A)(i) defines immediate family member as a spouse, unmarried minor child, or parent of a USC.

⁷³ Though VAWA self-petitioners adjust status under INA § 245(a), the inspected and admitted or paroled requirements do not apply to VAWA self-petitioners.

⁷⁴ US Department of State, Visa Bulletin, available at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>.

⁷⁵ INA § 245(c).

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.



HUMANITARIAN FORMS OF RELIEF

PART II: ASYLUM & SIJS

By Veronica Garcia

This practice advisory is the second resource in a two-part series on Humanitarian Forms of Relief for noncitizen victims of violence, serious crimes and persecution. They include: T nonimmigrant status, U nonimmigrant status, VAWA self-petition, asylum, and special immigrant juvenile status. The first advisory focused on giving an overview of VAWA, U, and T Visas. Including, eligibility requirements and some factors to consider before applying. This practice advisory will focus on giving an overview of asylum and special immigrant juvenile status (SIJS), including their eligibility requirements and some factors to consider before applying.

These advisories should be used as general guidance, to identify potential eligibility, and to understand the processes and benefits of each form of relief. For a more detailed analysis on issues related to humanitarian forms of relief, please visit the Immigrant Legal Resource Center website at <https://www.ilrc.org/immigrant-youth> for more information on SIJS and <https://www.ilrc.org/asylum> for more information on asylum.

I. Asylum:

Asylum is a form of protection available to individuals who are fleeing persecution or have a fear of persecution in their home country and meet the international definition of “refugee.” Individuals granted asylum will be eligible to live permanently in the United States, apply for lawful permanent residence, and petition for derivatives.

Law:

Asylum is incorporated into the Immigration and Nationality Act (INA) at INA § 208 for individuals who are applying for protection inside the country. Persons who are outside the United States must apply for refugee status pursuant to INA § 207. Asylum regulations can be found at 8 CFR § 208.

A. Eligibility for Asylum:

An individual is eligible to apply for asylum if they are physically present in the United States, meet the refugee definition, are not statutorily barred from applying, and merit a favorable exercise of discretion. A refugee is someone who is “unable or unwilling to return to, and is unable or unwilling to avail themselves of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”¹

The eligibility requirements for asylum are:

1. The harm feared/suffered rises to the level of persecution;
2. The fear is based on:
 - a. Past persecution OR
 - b. Well-founded fear of future persecution
3. Persecution was or would be *on account of* 1 of 5 enumerated grounds;
4. They could not avail themselves of the protection of their home country; and
5. That they are not barred from asylum protection.

1. Persecution:

Applicants for asylum have to show that the harm feared rises to the level of persecution. The INA does not define persecution, but a definition has been outlined by the Board of Immigration Appeals (BIA). The BIA states that persecution is “a threat to the life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive.”² Physical harm is not necessary to find persecution and courts have used a general definition of persecution that includes many forms of harm beyond physical harm, such as depriving a person of their freedom, food, housing, employment, or other essentials of life.³

Without a set definition, determining what constitutes persecution is a fact-intensive inquiry carried out by asylum officers and immigration judges. Adjudicators usually consider the following:

- **The cumulative effect of harm**— Adjudicators will take into consideration the cumulative effect of the abuses committed against the individual and determine whether the combination of those incidents rise to the level of persecution.⁴
- **Applicant’s subjective belief’s and character must be considered** a finding of persecution will depend in part on the subjective character of the asylum applicant.
- **The persecutor need not intend to harm the applicant**— the persecutor’s intent to punish or hurt the victim is not needed to find persecution since some persecutors may have acted to help the asylum seeker or include them in a cultural practice.⁵

Past Persecution refers to harm suffered before the applicant left their country. An applicant who can establish that they were persecuted in the past benefits from a presumption of a well-founded fear of future persecution, and in some cases, can be granted asylum on the basis of severe past persecution alone.

Well Founded Fear of Future Persecution refers to persecution feared by the asylum seeker. The fear must be both subjectively held (genuine) and objectively reasonable (plausible).⁶ The fear may stem from harm to their family, or similarly situated individuals.⁷ Past persecution can be used to establish likelihood of future persecution.⁸

2. Nexus:

Applicants will have to show that the persecution they suffered was “on account of” 1 of the 5 protected grounds. This is often referred to as the nexus and requires establishing a link between the persecution they experienced or fear and one of the protect grounds in the refugee definition. Proving the persecutor’s motivation⁹ can be established by either **direct**¹⁰ or **circumstantial**¹¹ evidence. Whether the persecutor intends to harm the applicant is irrelevant. The applicant will need to show that they were persecuted or will be because of their race, religion, nationality, political opinion, or membership in a particular social group.¹²

Example: After Svetlana’s parents saw her kissing and holding hands with one of her girlfriends from school, they interrogated their 17-year-old daughter and told her she would need to seek psychiatric help and possibly other medical treatment if she wished to continue living in their home and attending school. Fearing for her life and safety after a few psychiatric sessions where she was threatened with additional “corrective treatment,” Svetlana

ran away from home. The acts that Svetlana would be forced to undergo in order to “correct” her sexual orientation constitutes persecution on account of membership in the particular social group of young lesbians in Russia. To meet the nexus requirement, Svetlana must prove that any emotional, psychological, and even physical harm she might suffer as a result of the “corrective” medical treatment would be motivated by her being a lesbian. She must show a causal link between the persecution she will suffer (corrective medical treatment) and the protected ground that applies to her (the particular social group of young lesbians in Russia).

3. Enumerated Grounds:

In order to qualify for asylum, the applicant must have been persecuted on account of race, religion, nationality, political opinion, or membership in a particular social group.

Political opinion—beliefs about the society in which the applicant lived, “even if they did not participate in organized political activities.”¹³ To demonstrate a nexus between the harm an applicant suffered and their political opinion, the applicant must prove that they held (or their prosecutor believed that they held) a political opinion and they were harmed because of that opinion.¹⁴

Membership in a particular social group—a more open-ended ground that requires the applicant to define it. It does not require formal membership but rather refers to a “group of persons who share a common characteristic other than their risk of being persecuted OR who are perceived as a group by society.”¹⁵

In defining particular social group, the BIA has held that three elements must be present:

- (1) Members of a social group must share an “**immutable characteristic**” or a fundamental characteristic that the group cannot or should not be required to change. The characteristic must be “one that the members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.”¹⁶
- (2) The group must be defined with “**particularity.**” The core question is “whether the proposed group can accurately be described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a **discrete class of persons.**”¹⁷
- (3) The social group must be “**socially distinct**” or recognizable within the society in question.¹⁸

Note on *Matter of L-E-A*: In July 2019, Attorney General William Barr issued an opinion in *Matter of L-E-A*,¹⁹ which called into question whether “a nuclear family” will constitute a particular social group for purposes of asylum eligibility. The AG stated that a categorical rule that any nuclear family could be a cognizable PSG is inconsistent with both asylum law and BIA precedent²⁰ and that asylum adjudicators must look at the whether the specific family is distinct from other persons within the society in some significant way.²¹

For more information on this decision and strategies advocates can use when filing these claims, see the Catholic Legal Immigration Network, Inc. (CLINIC) Practice Pointer *Matter of L-E-A*, 27 I&N Dec. 581 (A.G. 2019), August 2, 2019, <https://cliniclegal.org/sites/default/files/resources/defending-vulnerable-populations/Litigation/L-E-A-Practice-Pointer-8-2-2019-Final.pdf>.

Religion—can implicate the right to hold a belief or the right to practice one’s belief, or both. This can include the protection of the “right to freedom of thought, conscience and religion, which includes the freedom of a person to change his religion and his freedom to manifest it in public or private, in teaching, practice, worship, and observance”²²

Nationality & Race—there is significant overlap between cases that argue persecution based on race and nationality. The term nationality can refer to citizenship, but also encompasses ethnic and linguistic groups. Race also refers to members of an ethnic or minority group.²³

4. Persecutor State versus Non-State Actor:

An applicant for asylum will have to show that they are unable or unwilling to avail themselves of the protection of their home country. An applicant can be unwilling to seek protection because of fear of harm or unable because the government cannot or will not offer protection.²⁴ When proving this, applicants will have to show that the harm was inflicted by a “state actor” or a “non-state actor” who the government was unable to or unwilling to control. A “state actor” is an individual or group who is part of the government. When the state actor is the persecutor, the applicant will not need to show they attempted to report the persecution to the police or to explain why the persecution was not reported.²⁵ A “non-state” actor includes all private individuals and groups, including family members. When the non-state actor is inflicting the harm, applicants may have to show that they sought the protection of the state but did not receive it. It is not essential to report harm to authorities when country conditions information indicates that reporting would have been dangerous or futile.²⁶

Note on *Matter of A-B*: In June 2018, the U.S. Attorney General Sessions (AG) issued *Matter of A-B*, 27 I&N Dec. 316 (A.G. 2018), which threatens the viability of asylum claims of domestic violence survivors and others who have faced persecution by a private actor. The AG deemed persecution by non-governmental actors as suspect questioning the validity of the asylum claims. This decision raises concerns for applications based on other protected grounds where a private actor carried out the persecution, specifically raising concerns about the likelihood of succeeding with claims of persecution based on domestic violence and gang violence. The AG decision gives a higher standard for satisfying the element of the government being “unable or unwilling,” stating that inaction alone is insufficient to satisfy the element and that applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims. It is important to note that the language of the decision does not alter the legal framework underlying asylum claims, but ICE and USCIS has incorporated the decisions’ language into policy memoranda and implementing new policy when evaluating these cases.

There are resources available on how to argue these cases and strategies when filing asylum claims. For more information about *Matter of A-B* and related practice materials, see <https://cgrs.uchastings.edu/A-B-Action> and ILRC’s Practice Advisory *Matter of A-B: Consideration* available at https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf.

5. Bars to Asylum Protection:

Applicants for asylum must not be statutorily barred. These statutory bars only apply to applicants who file for asylum after April 1, 1997. One of the most common is the one-year filing deadline that states an applicant who failed to file within one year of entry is barred from asylum.²⁷ There are some exceptions to meeting the one year filing deadline for “changed circumstances” and “extraordinary circumstances” at 8 CFR § 208.4. Changed circumstances refer to situations directly affecting the applicant’s eligibility for asylum, like a change in the applicant’s home country.²⁸ Extraordinary circumstances refer to factors related to missing the 1-year filing deadline. Applicants will have to show they did not intentionally fail to file because of their own actions or inactions.²⁹

Other bars include having an application previously denied, reentering after removal, conviction of a particular serious crime, committing a serious nonpolitical crime in home country, or persecution of others. A complete list of bars can be found in the regulations at 8 CFR § 208.4.

B. Benefits of Asylum:

If an asylum application remains pending for a period of 150 days without a decision or applicant-caused delay, the applicant will be eligible to apply for a work permit (EAD). Also, applicants may be eligible for some public benefits depending on the state they live in.

Applicants who are granted asylum are given lawful status indefinitely. Asylum never expires and if an applicant chooses to, they can remain in this status. Asylees are able to work legally in the United States and apply for lawful permanent residence after 1 year of being granted asylum. Furthermore, they will be eligible for several public benefits, like health and medical services, cash assistance, food stamps and others.

Derivatives: Applicants can include their spouses and unmarried children under 21 years of age in their asylum application and, if the application is approved, they will be granted asylum as well. An asylee is able to petition derivatives, even after being granted asylum, whether they live in the United States or abroad, so long as they do so within two years of receiving asylum.

Waiver: An asylee who is applying for adjustment of status must also show they are not inadmissible to the United States under the grounds of inadmissibility at INA § 212(a). There are some grounds of inadmissibility that do not apply to asylees, like the public charge. Asylees are eligible to apply for a waiver under INA § 209(c) for inadmissibility grounds that do apply. This waiver is more generous than the regular waivers under the various sections of INA § 212, as it allows USCIS to approve such a waiver “for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest.”

Pathway to Lawful Permanent Residence: An asylee will be able to apply for lawful permanent residence one year after being granted asylum. Asylees adjust status under INA § 209. Asylees are eligible to adjust status if they are in status, have been physically present in the United States for one-year, have not otherwise acquired LPR status, and are not inadmissible.

Although asylees are not required to file for adjustment, since their status will never expire, they are encouraged to, so that they can access other benefits, naturalize, and ensure they do not lose their protection.

Travel: Asylees can apply for a refugee travel document for international travel. However, asylees cannot travel back to their country of origin and generally should not do so, unless there is an emergency, until they become U.S. Citizen.

C. Considerations Before Applying for Asylum Status:

- Every asylum application requires either an interview with an asylum officer or a hearing before an immigration judge.
- Asylum cases that are not granted at the asylum office are referred to immigration court.
- There have been recent cases decided by the Attorney General and BIA attempting to limit many types of asylum claims—including claims based on domestic violence, gang violence, and the nuclear family. Despite this, asylum law has not changed, and adjudicators still have to analyze on a case by case basis.³⁰
- Affirmative asylum applications- those filed by people who do not have an active case in immigration court- are processed on a ‘last in, first out’ basis. Therefore, someone who applies will likely have an interview within a few weeks of submitting their application.
- While asylees can travel internationally with a refugee travel document, they should not travel back to their country of origin.

II. Special Immigrant Juvenile Visa (SIJS):

Special Immigrant Juvenile Status (SIJS) is a form of immigration relief available to undocumented children and youth who have been abandoned, neglected, or abused by one or both parents AND who have been found to be dependent upon a juvenile court or placed in the custody of an agency, entity, or individual appointed by the court. Individuals granted SIJS will be eligible to apply for Lawful Permanent Status once a visa is available.

Law:

The law for SIJS can be located at INA § 101(a)(27)(J) and the regulations are located at 8 CFR § 204.11.

Note that the regulations have not been updated to reflect changes made to SIJS by the Trafficking Victims Protection and Reauthorization Act (TVPRA) of 2008. It is important that individuals working on these cases use the Statute and Regulations with the new USCIS policy guidance available at: <https://www.uscis.gov/policymanual/HTML/PolicyManual.html> -I-360: Volume 6 (Immigrants), Part J (Special Immigrant Juveniles).

Furthermore, SIJS depends on the law of the State in which the findings are made.

A. Eligibility for SIJS:

The eligibility requirements for SIJS³¹:

1. Declared dependent of a juvenile court or placed under the custody of a state agency or individual or entity appointed by the state or court;
2. Reunification with one or both parents is not viable due to abuse, neglect, abandonment, or a similar basis under state law; and
3. Not in youth's best interest to be returned to country of origin.
4. Under 21 years of age;³²
5. Unmarried;

Before filing with USCIS, an applicant will have to obtain an order from a juvenile court with jurisdiction over the applicant where the judge finds that they meet the above requirements. These are referred to as "SIJS Findings." The SIJS findings must find that the child meets all of the eligibility requirements listed above.

1. Dependent of a juvenile court or placed under the custody of a state agency/individual/entity:

In order to be eligible to apply for SIJS, the applicant must be declared a dependent of a juvenile court or the court must have legally committed the child to, or placed them under the custody of, an agency or department of a state or an individual or entity appointed by a state or juvenile court.³³ A juvenile court is any court located in the United States that has jurisdiction under the state law to make judicial determinations about the custody of juvenile.³⁴

Dependency refers to the process by which decisions are made about the custody and care of a child who has come into the child welfare system because they are "dependent" upon government intervention to ensure their adequate care. When a juvenile court accepts jurisdiction to make a decision about the care and custody of a child, the child is dependent on a juvenile court and therefore the court can make SIJS findings.³⁵ This includes dependency court (child welfare), probate court (guardianship), family court (custody), and delinquency court (alleged violations of law by youth)³⁶.

Note for Applicants 18-21 years old—State laws vary as to how long a child can remain under juvenile court jurisdiction. Some states end dependency at 18 while others extend it until 21. This is in direct conflict with the statute which allows any person under 21 to apply. Because of this tension, there is a class of youth who are effectively barred from applying because no state court can take jurisdiction of them.

Additionally, recently USCIS has begun denying cases for youth who obtained a SIJS finding after they turned 18 years old. USCIS stated that state courts do not have power or authority to make these finding since they do not have the power to give custody back to the parents once the child turns 18. A class action lawsuit has been filed in New York and California challenging USCIS's denial of cases. *R.F.M. et al v. Nielsen et al*, No. 1:18-cv-05068 (S.D.N.Y. filed June 7, 2018); *J.L. et al v. Cissna et al*, No. 5:18-cv-04914 (N.D. Cal. filed Aug. 14, 2018).

Recently, the United States District Court of Southern District of New York issued a decision on the *R.F.M. et al v. Nielsen et al*, finding that the Government violated the law for all people like the plaintiffs (individuals whose application was based on New York Family Court Special Findings Order issued between their 18th and 21st birthday after January 1, 2016). For more information on the class action visit <https://www.uscis.gov/legal-resources/legal-settlement-notice/class-notice-rfm-v-nielsen-118-cv-5068-sdny>.

Visit the ILRC <https://www.ilrc.org/immigrant-youth> and Kids in Need of Defense (KIND) at <https://supportkind.org/> for general information on this matter.

2. Reunification with one or both parents is not viable due to abuse, neglect, or abandonment:

Applicants for SIJS will need a state court to find that reunification with one or both parents is not viable due to abuse, neglect or abandonment.

Reunification not viable: A state court must make a determination that reunification with one or both parents is not viable. This finding must happen under state law and without this a child cannot apply for SIJS.³⁷ This does not require a formal termination of parental rights or a determination that reunification will never be possible. In fact, it is possible that future reunification can happen without making a child ineligible, **BUT** separation should be significant and more than just short term.³⁸ Furthermore, the child does not need to be separated from both parents to be eligible for SIJS. In one-parent SIJS cases, where a child is in the custody of one parent, a court can still issue SIJS findings.

Abuse, neglect, or abandonment: A state court must find that reunification was not possible because of the abuse, neglect, or abandonment (or similar state law).³⁹ Abuse, neglect, and abandonment are defined under the law of the state where the child resides when filing for SIJS. There is no requirement that the abuse, neglect, or abandonment took place in the United States for the child to be eligible. This also does not require that formal charges of abuse, neglect, or abandonment be levied against that parent(s).

Example: Daniel, a 13-year-old boy from Honduras, was detained when entering the United States. He was later reunified with his mother in Fresno. Daniel had not seen his mother since he was eight, when she came to the United States to work and send money home to provide for Daniel. Daniel was raised by his maternal grandparents in Honduras. Daniel's father has not had any contact with him since he was three years old nor has he provided any financial or emotional support. Daniel's maternal grandparents cared for him in Honduras, but they were unable to protect him from gang violence and threats as he grew older.

Here, Daniel would be eligible to seek SIJS even though he is living with his mother because his father abandoned him when he was three years old. Moreover, it would not be in Daniel's best interest to return to Honduras because his grandparent's, who cared for him, were unable to shield him from danger in his home country and his mother would be able to care for him here.

3. Not in the youth's best interest to be returned to country of origin:

The court has to determine that it is not in the child's best interest to return to their home country. This can be shown through documentation about how the child is best supported by staying in the United States. For example, applicants can speak to their support network as well as their access to education, justice systems, and medical attention. In addition, country conditions information about their home country and the lack of resources or poor living conditions there can bolster their claim. For example, applicants can describe how they do not have a family member that can care for them in their home country or protect them from harm.

B. Benefits of SIJS:

Applicants who are granted SIJS will be eligible to apply for LPR status once a visa becomes available. Once they adjust status, they will be able to access public benefits and work lawfully.

Even though most locations do not allow access to public benefits until SIJS applicants adjust status, some states and localities do make certain benefits available to these minors. Other states provide general access for all minors to certain benefits regardless of immigration status.

Derivatives: SIJS applicants cannot include derivatives and while they can petition certain family members once they are LPRs or USCs through the regular family- based system, they are prohibited from ever petitioning their parents.

Waiver: There are many grounds of inadmissibility that do not apply to SIJS-based adjustment of status. There is no need to file for a waiver for those grounds, even if the child has triggered them. In addition, SIJS-based adjustment of status applicants are eligible for a waiver under INA § 245(h)(2)(B) for "humanitarian purposes, family unity, or when it is otherwise in the public interest" for the grounds that do apply to them.

As for March 2009, the following grounds of inadmissibility automatically do not apply to SIJS-based adjustment of status applicants and no application for a waiver is needed: public charge; aliens present without admission or parole; misrepresentation, including false claim to USC; stowaways; immigrants not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document; and unlawful presence (though minors do not accrue unlawful presence).

Most of the remaining grounds of inadmissibility may be "waived" for SIJS⁴⁰: health related grounds; prostitution and commercialized vices; failure to attend removal proceedings; smugglers; previous removals.

Pathway to Lawful Permanent Residence: An individual with an approved SIJS petition will be able to apply to adjust status when a visa becomes available. Depending on the country of origin of the minor, it may be possible to apply for adjustment concurrently or the individual may be subject to a waiting list. Once the applicant submits their application to adjust status, they will be issued a work permit. SIJS recipients are subject to the Employment-Based Preference Category 4. Minors from El Salvador, Guatemala, Honduras, and Mexico are subject to wait list while minors from any other country are immediately eligible to adjust status. Applicants can refer to the Visa Bulletin to estimate when their visa will be available at: <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin/2019/visa-bulletin-for-june-2019.html>.

C. Considerations Before Applying for SIJS Status:

- There are some discrepancies between states on when a child can be declared dependent on a court making it hard for some applicants between the ages of 18-21 years old to apply for SIJS despite the statute allowing for children who are under 21 to apply;
- Recently USCIS has been denying cases for youth who received their SIJS findings after turning 18 years old. Previously, cases in which the youth was over 18 were routinely approved but it has been reported that

changes in policy have resulted in massive denials of these cases. There have been class action lawsuits filed in New York and California and advocates should visit the ILRC at <https://www.ilrc.org/immigrant-youth>, and Kids in Need of Defense (KIND) at <https://supportkind.org/> for up to information and resources on the matter;⁴¹

- An applicant who is divorced or has children will not be barred from eligibility BUT an applicant will be ineligible if they are married. Applicants must remain unmarried until they are granted LPR;
- SIJS visas are given under the 4th preference category of employment-based visas (E4)—these have been recently oversubscribed for immigrants from El Salvador, Guatemala, Honduras, and Mexico. Applicants from these countries will have to wait until a visa is available before they can submit their application for adjustment.
- SIJS applicants are prohibited from ever petitioning their parents, even once they are USCs.

III. Conclusion:

The above is only a brief overview of what makes a person eligible for these humanitarian forms of relief. It is important to research each immigration option thoroughly before submitting an application and to consult immigration experts for any complex cases, especially in light of recent changes in policy and procedure within the Department of Homeland Security and Immigration Courts. Below is a list of resources to support advocates in exploring and pursuing these legal options with clients.

IV. Resources:

- For technical assistance when filing these applications:
 - ILRC Attorney of the Day Technical Assistance at <https://www.ilrc.org/technical-assistance>
 - Kids in Need of Defense (KIND) for assistance on youth filings at <https://supportkind.org/resources/>
 - Center for Gender and Refugee Studies (CGRS) for Asylum at <https://cgrs.uchastings.edu/request-assistance/requesting-assistance-cgrs>
- To refer clients to a free or low-cost, trusted legal service provider:
 - National Immigration Legal Services Directory: <https://www.immigrationadvocates.org/nonprofit/legaldirectory/>
- The National Immigration Law Center for resources on access to public benefits at www.nilc.org/accesstobens.html.
- USCIS released a new policy regarding when they will issue Notices to Appear (NTA) for applications that are denied, and the applicant has no other lawful status. For more information on how these impact these cases visit: <https://www.ilrc.org/annotated-notes-and-practice-pointers-uscis-teleconference-notice-appear-nta-updated-policy-guidance>
- There will be changes to the fee waiver in the coming months that may make it harder for applicants to apply because of application costs. Visit the ILRC website for up to date information on changes to the fee waiver at <https://www.ilrc.org/>.

End Notes

¹ INA § 101(a)(42)(A).

² *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985).

³ See *In re T-Z-*, 24 I&N Dec. 163, 171 (BIA 2007) (quoting H.R. Rep. No. 95-1452, at 5, as reprinted in 1978 USCCAN 4700, 4704, 1978 WL 8575 (“House Report”)).

⁴ See, e.g., *Bracic v. Holder*, 603 F.3d 1027, 1035-36 (8th Cir. 2010) (finding past persecution where respondent described numerous incidents of mistreatment by police and individuals dressed in police uniform, credible threats and beatings from soldiers, police and spy groups that had the authority to execute Muslims); *Javhlan v. Holder*, 626 F.3d 1119, 1123 (9th Cir. 2010) (detainment for four to five hours plus many threats to life resulting in partial stroke cumulatively constituted persecution); *Maldonado v. Att’y Gen.*, 188 Fed. Appx. 101 (3rd Cir. 2006) (finding that a gay man from Argentina had experienced persecution even though he had never suffered serious physical injuries, because he had been arrested and detained at least twenty times after coming out of a gay club); see also *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998) (“We find that these incidents constitute more than mere discrimination and harassment. In the aggregate, they rise to the level of persecution as contemplated by the Act”); *Singh v. INS*, 134 F.3d 962, 967 (9th Cir. 1998) (“The key question is whether, looking at the cumulative effect of all the incidents petitioner has suffered, the treatment she received rises to the level of persecution”).

⁵ *Matter of Kasinga*, 21 I&N Dec. 357, 365 (BIA 1996).

⁶ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430-31 (1987).

⁷ *Chen v. INS*, 195 F.3d 198, 203 (4th Cir. 1999); *Kourouma v. Holder*, 588 F.3d 234, 240 (4th Cir. 2009); *Huaman-Cornelio v. BIA*, 979 F.2d 995, 999 (4th Cir. 1992).

⁸ *Salari v. Ashcroft*, 114 F.App’x 815, 816 (9th Cir. 2004).

⁹ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992).

¹⁰ Direct Evidence of Motivation—statements made by either the persecutor or the applicant, notes left by the persecutor.

¹¹ Circumstantial Evidence of Motivation—overly severe punishment, flyers for hate groups left by the persecutor, anonymous threats and calls

¹² In *INS v. Elias-Zacaris* the “Court held that an asylum applicant must show proof of the persecutor’s motivation and demonstrate that the persecutor harmed the applicant “on account of” one of the enumerated grounds.

¹³ *Meza-Menay v. INS*, 139 F.3d 759, 763 (9th Cir. 1998); see also *Lazo-Majano v. INS*, 813 F.2d 1432, 1435 (9th Cir. 1987) (finding applicant’s belief that armed forces could not be restrained from their brutality constituted a political opinion even where the applicant “camouflaged” her belief and did not participate in politics), overruled on other grounds by *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*).

¹⁴ *Antonyan v. Holder*, 642 F.3d 1250, 1254 (9th Cir. 2011) (pre-REAL ID Act application).

¹⁵ UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, May 7, 2002, at ¶ 29, 7, available at www.unhcr.org/en-us/publications/legal/3d58ddef4/guidelines-internationalprotection-1-gender-related-persecution-context.html (last visited: June 11, 2019).

¹⁶ *Matter of Acosta*, 19 I&N Dec. at 233.

¹⁷ *Matter of S-E-G*, 24 I&N Dec. 579, 584 (BIA 2008) (emphasis added).

¹⁸ See *Matter of M-E-V-G, Respondent*, 26 I&N Dec. 227, 237 (BIA 2014); see also *Matter of W-G-R, Respondent*, 26 I&N Dec. 208 (BIA 2014) (review granted in part and vacated on other grounds by *Reyes v. Lynch*, 842 F.3d 1125 (9th Cir. 2016)).

¹⁹ *Matter of L-E-A-*, 27 I. & N. Dec. 581 (A.G. 2019).

²⁰ *Id.* at 591.

²¹ *Id.* at 594 (emphasis original).

²² UN Handbook at ¶ 71, 16.

²³ UN Handbook at ¶ 74, 16.

²⁴ *Navas v. INS*, 217 F.3d at 655-56.

²⁵ *Baballah v. Ashcroft*, 367 F.3d 1067, 1078 (9th Cir. 2004) (“Only where non-governmental actors are

responsible for persecution do we consider whether an applicant reports the incidents to police, because in such cases a report of this nature may show governmental inability to control the actors”).

²⁶ *In re S-A-*, 22 I&N Dec. 1328, 1335 (BIA 2000) (explaining that

reporting is unreasonable in certain circumstances, e.g., where the applicant’s persecutor is family who continues to closely monitor her every action).

²⁷ 8 CFR § 208.4(a)(2).

²⁸ 8 CFR § 208.4(a)(4)(i).

²⁹ 8 CFR § 208.4(a)(5)(i).

³⁰ See Immigrant Legal Resource Center’s Practice Advisory *Matter of A-B- Considerations* available at https://www.ilrc.org/sites/default/files/resources/matter_a_b_considerations-20180927.pdf and the Center for Refugee and Gender Studies *Matter of A-B- Resources* available at <https://cgrs.uchastings.edu/A-B-Action> for more information on strategies for filing cases.

³¹ INA § 101(a)(27)(J).

³² TVPRA provided an age out protection for SIJS, beginning in Dec. 23, 2008 so long as an applicant is under 21 years of age on the date on which an SIJS petition is properly filed, USCIS cannot deny SIJS to a person based on age. (Special Immigrant Juvenile Petitions 76 Fed. Reg. 54978 (sept. 6, 2011)).

³³ INA § 101(a)(27)(J)(i).

³⁴ 8 CFR 204.11(a).

³⁵ See, e.g., *In re Y.M.*, 207 Cal. App. 4th 892 (4th Dist. 2012).

³⁶ Note that that in other states juvenile courts may have different names and different types of qualifying proceedings (e.g., Surrogates Court, or “destitute child” proceedings in NY).

³⁷ INA § 101(a)(27)(J).

³⁸ *USCIS Policy Manual* Vol. 6, Part J, Ch. 2(D)(2) available at <https://www.uscis.gov/policy-manual/volume-6-part-j-chapter-2>.

³⁹ INA 101(a)(27)(J)(i).

⁴⁰ See INA § 245(h)(2)(B), as amended by the Miscellaneous and Technical Corrections Act of 1991 § 301(d)(2); USCIS Memorandum, *Trafficking Victims Protection Reauthorization Act of 2008: Special Immigrant Juvenile Status Provisions*, HQOPS 70, 8.5, 4–5 (Mar. 24, 2009) [hereinafter *Neufeld Memorandum*]; 7 USCIS-PM F(7)(C)(4).

⁴¹ Liz Robbins, *A Rule is Changed for Young Immigrants, and Green Card Hopes Fade*, N.Y. TIMES, Apr. 17, 2018, <https://www.nytimes.com/2018/04/18/nyregion/special-immigrant-juvenile-status-trump.html>. This change occurred without USCIS issuing any public announcement about a change in policy or otherwise announcing a changed interpretation of the SIJS eligibility requirements. Soon thereafter, *Politico* reported on a “clarification” by the USCIS chief counsel’s office—never announced publicly—“which called in February for the agency to reject pending applications in cases where applicants could not be returned to the custody of a parent.” Ted Hesson, *USCIS Explains Juvenile Visa Denials*, POLITICO, Apr. 25, 2018, <https://www.politico.com/newsletters/morning-shift/2018/04/25/travel-ban-at-scotus-182935>. Since most courts cannot place a child back into the custody of their parent once the child reaches the age of majority, according to the new USCIS interpretation, those state courts “do not have power and authority to make the reunification findings for purposes of SIJ eligibility.” *Id.* At the time of writing, class action lawsuits have been filed in New York and California challenging USCIS’s denial of cases based on this unannounced policy change. *M. et al v. Nielsen et al*, No. 1:18-cv-05068 (S.D.N.Y. filed June 7, 2018); *J.L. et al v. Cissna et al*, No. 5:18-cv-04914 (N.D. Cal. filed Aug. 14, 2018). However, in the meantime, it seems clear that USCIS intends to deny many cases in which the SIJS findings were obtained after the youth turned eighteen, though this may depend to some extent on state law

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About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.

Advisory Council on Immigration Issues in Family Court Memorandum #1

To: Family Court Judges, Chief Clerks and Non-judicial Staff

From: Advisory Council on Immigration Issues in Family Court

Re: Guidance on Guardianship Matters and
Applications for Special Immigrant Juvenile (“SIJ”) Findings

Date: January 4, 2017

The Advisory Council on Immigration Issues in Family Court, co-chaired by Hon. Edwina G. Mendelson, Acting Supreme Court Justice, and Theo S. Liebmann, Clinical Professor and Director of Clinical Programs, Hofstra Law School, was appointed by Chief Administrative Judge Lawrence Marks in 2015. The Council has prepared this memorandum to assist Family Court jurists and non-judicial staff regarding issues frequently arising in guardianship proceedings involving requests for the State court special findings required by Federal law for juveniles to obtain Special Immigrant Juvenile Status (SIJ). This is the first in a series of memoranda, bench aids and other documents in preparation by the Council to address the variety of immigration issues arising in and as a result of Family Court proceedings.

Background

In the past five years, the number of children seeking refuge in the United States has increased dramatically.¹ These children are often escaping violence in their homes and communities, abject poverty, and extreme governmental dysfunction.² New York State, where many of them have relatives or other community connections, is a frequent destination. In fact, for immigrant children crossing the U.S.-Mexico border, New York State is the fourth-most common state destination, and Nassau and Suffolk counties are both among the top-10 most frequent county destinations.³

Many of the children coming to New York and other states are eligible for a form of immigration relief called Special Immigrant Juvenile (“SIJ”) Status. A grant of SIJ Status provides a pathway to lawful permanent residence, also known as a “green card.” SIJ Status is available to children who can provide an order from a state “juvenile” court showing the following: (1) they are under 21; (2) they are unmarried; (3) they are either dependent on a juvenile court, or have been placed by a juvenile court under the custody of a state agency or department, or have been placed by a State or juvenile court under the custody of an individual or entity; (4) they are not able to reunify with one or both parents due to abuse, neglect, abandonment or a similar basis; and (5) it is not in their best

¹ See U.S. Customs and Border Patrol on-line report “United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016,” available at <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

² See Migration Policy Institute’s February 18, 2016 on-line report “Increased Central American Migration to the United States May Prove an Enduring Phenomenon,” available at <http://www.migrationpolicy.org/article/increased-central-american-migration-united-states-may-prove-enduring-phenomenon>.

³ See U.S. Office of Refugee Resettlement on-line reports at <http://www.acf.hhs.gov/orr/programs/ucs/state-by-state-uc-placed-sponsors>; and at <http://www.acf.hhs.gov/orr/unaccompanied-children-released-to-sponsors-by-county>.

interests to return to their country of origin.⁴ The family court has a discrete yet vital role in these children's pursuit of SIJ Status: the family court does not and cannot grant SIJ Status or any immigration benefit; however, only a state "juvenile court" such as a family court, and not a federal court, can make the necessary pre-cursor findings that accompany the SIJ application made to the United States Citizenship and Immigration Services ("USCIS"), the federal agency that ultimately determines SIJ eligibility.⁵

New York has for many years recognized the family court's jurisdiction over motions seeking the five SIJ findings, the court's obligation to issue findings when supporting evidence is presented, and the consistency of issuing SIJ findings with family court goals of permanency, stability and safety.⁶ New York courts have also recognized the important but limited role that SIJ findings, and therefore the family courts, play in the ultimate decision on whether a child will be permitted to stay in the U.S.⁷ As numerous decisions have noted, while a family court can issue an order granting SIJ findings, the order is not a final determination on whether a child will be permitted to stay in the U.S., nor is it even a grant of SIJ Status; it is solely an issuance of specific state court findings that a child must obtain in order to proceed with an application for SIJ Status before USCIS.⁸

As the number of children eligible for SIJ Status in New York has increased, so has the number of children accessing the family courts both to have adult caretakers appointed as their guardian, and to ask family courts to issue SIJ findings. This increase, which has put enormous pressures on the clerical and judicial components of a number of family courts throughout the State, has also led to a wide divergence in how the cases are brought by attorneys, and how they are handled by the courts. In response to that divergence, this Advisory Memorandum provides guidance on a number of issues for courts to consider in assessing applications for guardianship and SIJ findings, and for attorneys to consider in bringing those cases.⁹

Testimony and Affidavits in Uncontested Matters

The vast majority of guardianship/SIJ cases are uncontested. As with other types of matters which at times come before the family court without being contested by an opposing party – such as one sided custody or family offense matters; neglect or termination of parental right inquests; or most adoption matters – jurists must necessarily rely primarily on the evidence presented by the parties

⁴ 8 U.S.C. § 1107(a) (27)(J). A juvenile court is any court with jurisdiction to make "judicial determinations about the custody and care of juveniles." See 8 C.F.R. §204.11(a).

⁵ *Id.* See also U.S. Citizen and Immigration Services Memorandum "Trafficking Victims Protection Reauthorization Act of 2008: Special immigrant Juvenile Status Provisions" (March 24, 2009), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files/Memoranda/2009/TVPRA_SIJ.pdf. While this advisory memorandum focuses on family court proceedings, there may be other state courts which have jurisdiction to make SIJ findings.

⁶ See, e.g., *Matter of Antowa McD.*, 50 A.D.3d 507 (1st Dept., 2008); *Matter of Trudy Ann W.*, 73 A.D.3d 793 (2nd Dept. 2010). See also New York State Unified Court System General Form G-42 ("Special immigrant Juvenile Status – Order"), available at nycourts.gov/forms/familycourt/general.

⁷ See, e.g., *Matter of Marcelina M.-G.*, 112 A.D.3d 100 (2nd Dept. 2013); *Matter of Marisol N.H.*, 115 A.D.3d 185 (2nd Dept. 2014).

⁸ *Id.*

⁹ Applications for SIJ findings can be and are made in contexts other than guardianship of the person matters, including abuse and neglect, delinquency, custody, adoption, destitute child, and family offense proceedings. This advisory memorandum focuses on discrete issues in guardianship proceedings that were most commonly raised by jurists and advocates as areas where guidance and clarification would prove especially useful.

who are present. For most uncontested guardianship/SIJ cases, therefore, jurists use their expertise to assess the credibility of testimony, affidavits, or other evidence presented, just as they do in other types of uncontested cases. Family courts use the sworn testimony of the proposed guardian, or the child, or both, to elicit evidence regarding the applications for guardianship and SIJ findings, and to address the central issues in question – whether granting the guardianship serves the interests of the minor, and whether the facts presented support each of the five SIJ findings.¹⁰

In guardianship / SIJ matters, as in any other case, jurists also rely on the assumption that the attorneys appearing before them are practicing and presenting evidence in a manner consistent with their ethical duties under the New York State Rules of Professional Conduct. These duties include requirements related to candor to the court, timely and diligent pursuit of a case, merit of the claims being brought, and avoidance of conflicts of interest.¹¹

A child appearing in a guardianship / SIJ matter has a right to be represented by counsel.¹² The child can be represented by a lawyer of their own choosing or by an appointed counsel, just as minors in any family court proceeding are.¹³ These attorneys are ethically obligated to provide sufficient information to the court to support their position in their role as advocates for the minors. This includes the obligation to counsel their child clients about the availability of SIJ findings, and to seek SIJ findings whenever appropriate.¹⁴ Many children who appear in guardianship / SIJ matters come to court having already procured representation from a pro bono or low bono attorney, a private attorney, a legal services or legal aid attorney, or an attorney from a variety of other agencies and clinics that specialize in representing children. Where a minor does not appear with her own attorney, she has the right to have one appointed to represent her. Where the minor does appear with an attorney, the court should permit the child to be represented by the lawyer she has chosen rather than appoint one that the child has not chosen, unless there is a clear conflict of interest.¹⁵

Testimony, affidavits, and other evidence presented by lawyers for children or proposed guardians through written motions and hearings are the primary and most common method through which jurists assess the applications in guardianship / SIJ matters. Where additional information is

¹⁰ The testimony of an older child, in particular, is helpful in evaluating the appropriateness of the guardian, and the preference of an older child for a particular guardian is deserving of significant weight. With younger children, whether or not to require testimony of the child will depend in part on the court's assessment of the effect on the child of providing such testimony. In all instances, courts regularly consider the age, developmental stage and emotional well-being of children in determining whether to require testimony, in framing questions and in weighing testimony.

¹¹ N.Y. Rules of Professional Conduct, Rules 1.1, 1.3, 1.7, 1.8, 3.1, and 3.3. *See also* 22 NYCRR Rule 130-1.1-a of the Rules of the Chief Administrative Judge, which requires attorneys to sign all pleadings, written motions and other papers submitted, and which deems the attorney's signature to constitute a certification that "to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances... the presentation of the paper or the contentions therein are not frivolous..." If a judge sees that an attorney is acting in a manner inconsistent with the Rules of Professional Conduct, the judge should take appropriate action. 22 NYCRR Rule 100.3(D).

¹² Fam. Ct. Act §241.

¹³ *Id.* Proposed guardians and respondents in guardianship cases who are indigent can also be appointed counsel at the discretion of the court, and are permitted to waive counsel as well if they choose. Fam. Ct. Act §262.

¹⁴ NYSBA Comm. on Children and the Law, STANDARDS FOR ATTORNEYS REPRESENTING CHILDREN IN CUSTODY, VISITATION AND GUARDIANSHIP PROCEEDINGS, Standard C-8 (2015);

¹⁵ *Matter of Elianne M.*, 196 A.D.2d 439 (1st Dept.1993); *Sosa v. Serrano*, 130 A.D.3d 636 (2nd Dept. 2015); *Bryan v. Singer*, 234 A.D.2d 631 (3rd Dept. 1996). Unless there is an identifiable reason to doubt the candor or competence of a retained attorney, appointing an attorney for the child *in addition* to allowing the retained attorney to remain on the case can be both confusing for the child and counter-productive.

necessary, there are other sources of information for courts and attorneys to consider. These include reports from the State Central Registry, fingerprinting results, and Court-Ordered Investigations conducted by the local social services agency or probation department, each of which is described below.¹⁶

State Central Registry History

Surrogate's Court Procedure Act §1706(2) requires that a court hearing a guardianship matter ask the office of children and family services ("OCFS") to determine whether a proposed guardian, or any other resident of the proposed guardian's home who is 18 or over, has been the subject of an indicated report or is currently under investigation for a report.¹⁷ Petitioners in guardianship proceedings must fill out Form OCFS-3909 at the initiation of any guardianship proceeding so that the family court can procure that information from OCFS. The State Central Registry of Child Abuse and Maltreatment (SCR) then provides the court with a summary of any indicated reports of child abuse or neglect against the nominated guardian and other residents age eighteen or older. While the existence of an indicated report, or even a finding in an Article 10 case, will usually be relevant to guardianship determinations, the weight given that information will vary depending on the circumstances of any individual case.

Fingerprinting

Before making the best interests determination required in a guardianship case, jurists want as much information as possible to ensure that their decision is consistent with what will best serve the stability, security and permanency of the child. Fingerprinting can provide information on the criminal history of adults in the child's home that is useful in making that determination. Although most family courts in New York require fingerprinting as a matter of course in all guardianship cases, neither the New York Family Court Act (FCA) nor the Surrogate's Court Procedure Act (SCPA) actually require fingerprinting of potential guardians or other individuals in guardianship of the person cases.¹⁸ Ordering fingerprints in any specific case is therefore at the discretion of the

¹⁶ The methods, if any, to use in a given case will depend on each judge's assessment of a variety of factors including the age of child, whether the child lives with the guardian, and whether the guardian is the child's parent, among others. In cases in which the proposed guardian is a parent, for example, the parent-child relationship should enjoy a presumption of safety, security and legitimacy, absent clear evidence to the contrary.

¹⁷ Provisions of the Surrogate's Court Procedure Act apply in family court guardianship of the person cases where the Family Court Act is silent. Fam. Ct. Act §661(a).

¹⁸ Most family court petitions for guardianship are filed as *guardianship of the person* matters under Family Court Act (FCA) §661(a) and the Surrogate's Court Procedure Act (SCPA). The requirements for a petition differ depending on whether the matter is a *permanent guardianship* case or a *guardianship of the person* case. A permanent guardian pursuant to FCA §661(b) is available only in cases where "guardianship and custody of a child have been committed to an authorized agency" pursuant to laws regarding permanent neglect, foster care, or other laws, or when "both parents of the child whose consent to the adoption of the child would have been required . . . are dead." *Id.* SCPA §1704 subsections (1) through (7) lists the requirements for guardianship petitions that apply to both types of guardianship cases. The requirements include, *inter alia*, information regarding the child, his/her birth parents, previously ordered guardianship appointments, whether the nominated guardian or other individuals residing with the guardian have been the subject of an indicated report, and reasons why the person nominated would be a suitable guardian. *See* SCPA §1704. The requirements listed in subsection (8) of SCPA §1704 apply only to *permanent guardian* cases. Those requirements include the results of the criminal history record check of the guardian and any adults residing in the guardian's household, if such a record check has been conducted, and the results of a search of the statewide central register of child abuse.

judge.¹⁹ Ultimately the decision to exercise discretion in requiring fingerprinting rests on whether the court is satisfied, on a case-by-case basis, that the child is safe and secure under the guardian's care and that the guardian holds the child's best interests as paramount, or whether there is an identifiable cause for concern that may be allayed by procuring fingerprinting results. When the court is deciding whether or not to order fingerprints in any specific guardianship case, and which adults in a home should be required to be fingerprinted, a number of factors, including the following, can be useful:²⁰

- **Lack of U.S.-issued Identification Documents**

In New York City, fingerprinting can be completed for adults regardless of whether the adult possesses U.S.-issued identification; outside of New York City, however, most fingerprinting centers used by family courts require that a U.S.-issued identification document be provided at the time of the fingerprinting. Many immigrants do not have such identification, and therefore are turned away by the fingerprinting centers. Family courts have tried a variety of alternatives to work around this problem, including the following:

- Allowing a social service agency to take the fingerprints and send them to Albany, with an affidavit of chain of custody;
- Using local stores that offer fingerprinting as a service;
- Sending immigrant families to police precincts to be fingerprinted.

These options present problems for immigrant families. Local stores charge anywhere from \$30-\$100, creating a financial barrier for access to a court that generally seeks to avoid such barriers as a matter of public policy.²¹ In addition, precincts are often unwilling to take fingerprints if someone cannot prove residency, and police contact can be a frightening and intimidating experience for an undocumented individual and their family.

- **Fear of Law Enforcement Using Fingerprints for Deportation Purposes**

Many in the immigrant community fear fingerprinting for any purpose as many different databases have been available at different times to Immigration and Customs Enforcement. That fear may have the unintended and unfortunate consequence of discouraging the most suitable potential guardians from stepping forward and offering permanency and stability for children and youth.²²

¹⁹ But see *Matter of Silvia N.L.P.*, 141 A.D.3d 654 (2nd Dept. 2016) (finding that dismissing a case solely because of a guardian's failure to be fingerprinted is reversible error).

²⁰ This list of factors is not exhaustive, and the specific facts of any case are always particularly relevant to weighing whether or not to require fingerprinting. Where the minor does not live with the proposed guardian, or where the minor is 18 or older, for example, fingerprinting may be less significant to assessing best interests. Similarly, it may be less important for the court to order fingerprinting of adults in the minor's household with whom the minor has little interaction.

²¹ See, e.g., Fam. Ct. Act §261.

²² Some cities, such as New York City, have issued executive orders that prohibit police or other government employees from disclosing immigration status for immigration enforcement purposes. See NYC Exec. Order No. 34, which, among other things, prohibits police from asking about or disclosing immigration status for purposes of investigating any crime related to immigration status; and Exec. Order No. 41, which places that same prohibition on all city agency employees.

- **Lack of Interpreting Services at Fingerprinting Location**

Some individuals are wrongfully turned away or are unable to properly determine who should be fingerprinted once they present themselves to a fingerprinting location because they lack an interpreter at the appointment. Additionally, courts may have difficulty setting up the appointment if the form is not filled out to the state's satisfaction. Without an interpreter's assistance in filling out the form, significant delay can result from simple miscommunications and misunderstandings of the complex forms and systems involved in the fingerprinting process.²³

- **Non-Traditional Housing and Multi-Family Dwelling Units**

Increasingly, immigrant families are residing in non-traditional living arrangements within multi-family dwelling units. New York State has one of the highest housing costs in the country. Immigrant families are often low-income. Many live in multi-dwelling units as a necessary way to reduce housing costs. Often, the various individuals living in such settings have little or no contact with each other, and different families typically have their own locked rooms. Much like domestic violence shelters, large apartment complexes and homeless shelters, fingerprinting everyone in the residence can be impracticable and not necessary to prevent harm to the child.

Court Ordered Investigations

A family court judge can order an investigation of a home through the probation service or through a child protection service to ascertain the safety of a nominated guardian's home.²⁴ Where the testimony or other evidence presented is insufficient, or where the evidence presented creates concerns about the safety of the home, court-ordered investigations (COIs) conducted by the local social services agency or probation departments are another tool that courts may use to obtain additional information of the guardian's home.²⁵ Both the department of probation and child protection services agencies are required to comply with court orders for COIs in guardianship matters.²⁶

Conclusion

We hope that the guidance provided in this memorandum will clarify some of the questions and concerns related to guardianship petitions and applications for SIJ findings that are most commonly raised with Council members by the judiciary and by advocates.

²³ Pursuant to NYS Governor's Executive Order 26, all State agencies are required to offer language assistance to all persons with limited English proficiency.

²⁴ Fam Ct. Act §§252(d), 1034(1)(b). Family court jurists can order §1034 investigations to determine whether an abuse or neglect proceeding should be initiated. In addition, Social Serv. L. 422(4)(e) permits courts to obtain the full array of information in any State Central Registry report if the court determines that information is necessary for the determination of an issue before the court.

²⁵ Neither departments of social services nor departments of probation may collect fees from parties for COIs in guardianship matters. Pursuant to Family Court Act Sections 653 and 252-a, such fees may only be collected by a department of probation in habeas proceedings and custody proceedings – *not* in guardianship proceedings.

²⁶ See *Matter of Sing W.C.*, 83 A.D.3d 84 (2nd Dept. 2011) (affirming authority of family court to order children's services agency to conduct investigation or home study of minor in guardianship matter who is over age 18).

cc.: Hon. Michael Cocomma
Hon. Fern Fisher
Administrative Judges
John W. McConnell
Ron Younkens
Hon. Edwina G. Mendelson
Theo S. Liebmann
Janet Fink

Advisory Council on Immigration Issues in Family Court Memorandum #1A

To: Family Court Judges, Chief Clerks and Non-judicial Staff

From: Advisory Council on Immigration Issues in Family Court

Re: Supplemental Guidance on Guardianship Matters and Applications for Special Immigrant Juvenile (“SIJ”) Findings

Date: May 7, 2018

The Advisory Council on Immigration Issues in Family Court was created by Chief Administrative Judge Lawrence Marks in 2015. In January 2017, the Council prepared and distributed a memorandum entitled *Guidance on Guardianship Matters and Applications for Special Immigrant Juvenile (“SIJ”) Findings* (SIJ Guidance Memo). The goal of the SIJ Guidance Memo was to assist Family Court jurists and non-judicial staff regarding issues related to guardianship proceedings and requests for the State court special findings required by Federal law for juveniles to obtain SIJ Status.

Beginning in early 2017, the United States Citizenship and Immigration Services (USCIS) has deemed a large and increasing number of Family Court orders insufficient to establish the SIJ findings required of a State court. This change in USCIS responses to SIJ applications has transpired without any change in the Federal law, rules or regulations that govern SIJ matters. In addition, the responses also depart significantly from previous USCIS adjudication practices where SIJ orders with identical language had for many years been deemed sufficient and resulted in SIJ Status approvals. There is, consequently, understandable uncertainty about what impact the increased number of rejected applications has on State law SIJ-related practice. This Supplemental Memorandum provides information and guidance related to the question of that impact.

Background

SIJ Status is available to children who can provide an order from a state “juvenile” court showing the following: (1) they are under 21; (2) they are unmarried; (3) they are either dependent on a juvenile court, or have been placed by a juvenile court under the custody of a state agency or department, or have been placed by a State or juvenile court under the custody of an individual or entity; (4) they are not able to reunify with one or both parents due to abuse, neglect, abandonment or a similar basis; and (5) it is not in their best interests to return to their country of origin.¹

As noted in the first SIJ Guidance Memo, the family court has a discrete yet vital role in these children’s pursuit of SIJ Status: the family court does not and cannot grant SIJ Status or any immigration benefit; however, only a state “juvenile court” such as a family court, and not a federal court, can make the necessary pre-cursor findings that accompany the SIJ application made to USCIS.²

¹ 8 U.S.C. § 1107(a)(27)(J). A juvenile court is any court with jurisdiction to make “judicial determinations about the custody and care of juveniles.” See 8 C.F.R. §204.11(a).

² *Id.* See also U.S. Citizen and Immigration Services Memorandum “Trafficking Victims Protection Reauthorization Act of 2008: Special immigrant Juvenile Status Provisions” (March 24, 2009), available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/TVPRA_SIJ.pdf.

USCIS Responses to SIJ Status Applications

When USCIS determines that a Family Court SIJ Order is sufficient, and when a variety of other criteria are met, USCIS will typically grant SIJ Status to the applicant child.

When USCIS deems a Family Court SIJ Order insufficient, they can return it to the child with a Request for Evidence (RFE) or a Notice of Intent to Deny (NOID). An RFE, which typically precedes the issuance of a NOID, seeks additional evidence, often including an amended SIJ Order, to address specific concerns. Child applicants have 90 days to respond to an RFE. A NOID indicates USCIS' intent to deny the SIJ petition, and provides the child with 30 days to contest the grounds for the anticipated denial. USCIS can also issue a Notice of Intent to Revoke (NOIR), which indicates the intent by USCIS to revoke a previously granted application for SIJ Status.

Since early 2017 there has been a stark and dramatic increase in the number of children who are receiving RFEs, NOIDs and NOIRs. USCIS' bases for determining SIJ Orders insufficient have included the following:

- Insufficient description of the facts underlying the determination of abuse, neglect, abandonment or a similar basis;
- Insufficient facts to support the determination that it is not in the child's best interests to return to her country of origin;
- Insufficient citation to the State law under which specific findings are made;
- Insufficient basis for finding that guardianship constitutes "dependency" on the Family Court;
- Insufficient basis for finding that the Family Court acts as a "juvenile court" when making guardianship determinations for minors ages 18, 19 and 20;
- Insufficient basis for finding that the Family Court has jurisdiction to reunify minors with their parents once the minor reaches age 18; and,
- Insufficient basis for finding that the death of a parent constitutes a "similar basis" under State law.

Family Court Guidance

In response to these unanticipated changes in USCIS practice, Family Court practitioners and jurists can make additional efforts to ensure that SIJ Orders utilize suitable and sufficient factual context and legal citation, including for cases where an SIJ Order has already been issued and practitioners are seeking an Amended Order from the Family Court.³

³ The Family Court maintains jurisdiction over motions for Amended SIJ Orders and *nunc pro tunc* Orders even where the minor has turned 21 since the original SIJ Order was issued. See *In re Juan R.E.M.*, 154 A.D.3d 725 (2nd Dept. 2017) (Appellate Division holds motions to amend SIJ Orders can be filed after minor turns 21 so long as guardianship order was issued prior to minor turning 21). See generally *In re Emma M.*, 74 A.D.3d 968 (2nd Dept. 2010) (Appellate Division overturns Family Court's denial of *nunc pro tunc* special findings motion).

Practitioners and jurists can address many of the issues raised in USCIS responses through reference to New York statutory law and appellate case law in Orders and Amended Orders; many are also addressed by the new GF-42 form.⁴ For example:

- The insufficiency of the basis for factual findings, and the insufficiency of State law citations, may be addressed by ensuring, as indicated on the new GF-42, that sufficient factual and statutory bases are provided for the Order generally, as well as for each finding.
- The basis for guardianship constituting “dependency” is recognized across the State, and may be addressed through citations to determinations by the three appellate divisions that have reached this issue.⁵
- The basis for New York Family Courts acting as a “juvenile court” for youth ages 18, 19 and 20 in guardianship cases may be addressed through the use of the language in the opening paragraph and Note in the new GF-42⁶ –
 - *This Court, after examining the motion papers, supporting affidavits, pleadings and prior proceedings in this matter, and/or hearing testimony, finds, in accordance with its jurisdiction to determine custody and guardianship of minors up to the age of 21 under Article 6, §13, of the New York State Constitution, section 115 of the Family Court Act and §_____ of the [check applicable box]:* ☐ *Family Court Act* ☐ *Social Services Law* ☐ *Domestic Relations Law* ☐ *Surrogate’s Court Procedure Act* ☐ *Other [specify].*
 - *NOTE [Guardianship cases]: Family Court Act §657(c) provides that an order of guardianship under Family Court Act §661 conveys “the right and responsibility to make decisions, including issuing any necessary consents, regarding the child’s protection, education, care and control, health and medical needs, and the physical custody of the person of the child.*
- The basis for the Family Court’s jurisdiction to reunify minors up to age 21 with their parents can be addressed through citation to the numerous statutory provisions which grant the Family Court that power in various contexts.⁷

⁴ The GF-42 is the SIJ Order form posted on the New York State Unified Court System website. *See* New York State Unified Court System General Form G-42 (“Special immigrant Juvenile Status – Order”), available at nycourts.gov/forms/familycourt/general. A copy of the new GF-42 is attached to this memorandum. Note that the GF-42 is a form designed to assist practitioners and jurists in preparing effective SIJ Orders; there is no requirement that New York State courts use this specific form when preparing SIJ Orders.

⁵ *See, e.g., Matter of Antova McD.*, 50 A.D.3d 507 (1st Dept. 2008); *Matter of Trudy Ann W.*, 73 A.D.3d 793 (2nd Dept. 2010); *Matter of Keilyn GG.*, 159 A.D.3d 1295 (3rd Dept. 2018).

⁶ There are numerous proceedings, including guardianships, where the Family Court exercises its jurisdiction over the custody and care of minors up to age 21, including permanency hearings for abused and neglected children in State care, minors who wish to return to State care after their 18th birthday, permanency hearings for destitute children who are in State care, and minors in State care pursuant to juvenile delinquency proceedings. N.Y. Fam. Ct. Act Articles 3; 6; 10-A; 10-B; 10-C.

⁷ *See, e.g.,* Family Court Act §§ 1087(a) (including, under definition of “child,” minors between 18 and 21 who have consented to continuation in foster care or to trial discharge status); 1089-a (permitting award of custody and guardianship of minor up to age 21 to any relative or respondent parent at permanency hearing); 355.5 (authorizing return to parent of minors up to age 21 who are placed with a commissioner of social services or office of children and family services). Family Court Act § 661(a) similarly grants the Family Court the power in guardianship matters to place minors up to age 21 in the care and custody of parents from whom they had been separated. *See Matter of Marisol N.H.*, 115 A.D.3d 185 (2nd Dept. 2014) (Family Court has jurisdiction over guardianship matter where mother was proposed guardian for children ages 19, 18, and 16 from whom she had been separated).

- The determination of “death” as a similar basis can be supported by citation to relevant statutory and appellate case law, and an explicit description of how the death of a parent or parents creates challenges similar to those that arise from abandonment by a parent.⁸

Conclusion

New York has for many years recognized the Family Court’s jurisdiction over motions seeking SIJ Orders; the consistency of issuing SIJ findings with Family Court goals of permanency, stability and safety; and the important but limited role that SIJ findings play in the ultimate decision by USCIS on whether a child will be granted SIJ Status and permitted to stay in the U.S.⁹ Our State courts consequently have an ongoing obligation to issue requested SIJ Orders and Amended SIJ Orders when consistent with State law and when supporting evidence is presented, regardless of any changes in how USCIS approaches applications for SIJ Status.

⁸ *See, generally*, Family Court Act Article 10-C (“Destitute Children”). *See also Matter of Luis R. v. Elena G.*, 120 A.D.3d 581 (2nd Dept. 2014); *Matter of Jose YY.*, 158 A.D.3d 200 (3rd Dept. 2018).

⁹ *See, e.g., Matter of Marcelina M.-G.*, 112 A.D.3d 100 (2nd Dept. 2013); *Matter of Marisol N.H.*, 115 A.D.3d 185 (2nd Dept. 2014).

Advisory Memorandum #2

To: Family Court Judges, Chief Clerks and Non-judicial Staff

From: Advisory Council on Immigration Issues in Family Court

Re: Guidance on Family Court Role in U Nonimmigrant Status Certification

Date: June 1, 2017

The Advisory Council on Immigration Issues in Family Court, co-chaired by Hon. Ruben Martino, Supervising Judge, Family Court, Bronx County, and Theo S. Liebmann, Clinical Professor and Director of Clinical Programs, Hofstra Law School, was appointed by Chief Administrative Judge Lawrence Marks in 2015. The Council has prepared this memorandum as the second in a series of memoranda, bench aids and other documents to address the variety of immigration issues arising in and as a result of Family Court proceedings. It was prepared primarily by the Council's Subcommittee on U Nonimmigrant Status and is intended to assist Family Court jurists and non-judicial staff regarding the role of family court judges, referees, and magistrates in the U Nonimmigrant Status certification process. [A list of the Council's members, including the Subcommittee, is attached as Appendix A to this memorandum].

Background

In 2000, Congress created U Nonimmigrant Status to grant immigration status to victims of certain specified crimes, including domestic violence.¹ Adults and children with U Nonimmigrant Status receive, among other benefits, temporary permission to stay in the U.S. for four years, employment authorization to work legally in the U.S., and the ability to apply for lawful permanent residence.² The statutory requirements for U Nonimmigrant Status are outlined in 8 U.S.C. § 1184(a)(15)(U), which provides that applicants must submit “a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority” that the applicant ‘has been helpful, is being helpful, or is likely to be helpful’ in the investigation or prosecution of criminal activity.” This certification takes the form of Form I-918 Supplement B, U Nonimmigrant Status Certification (“I-918 Supp B”).³ Following submission of the I-918 Supp B and several other documents demonstrating an applicant’s eligibility for the relief, the Department of Homeland Security (“DHS”) makes the final decision on whether to grant U Nonimmigrant Status.⁴

New York has prioritized the processing of the I-918 Supp B form by certifying agencies, both at the state and city levels.⁵ Fair administration of the process depends upon the consistent participation of family court judges, referees, and magistrates, who are important certifiers in New York.⁶ Part 1 of this document reviews the trajectory of the I-

¹ See U.S.C. § 1101 *et. seq.*

² See INA §§214(p)(6); 214(p)(3)B); 245(m).

³ 8 U.S.C. § 1184(p)(1).

⁴The information contained in the required certification is important, but not dispositive as to whether DHS will issue a certification. See New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,019-24 (Sept. 17, 2007) (codified at 8 C.F.R. pts. 102, 212, 214, 218, 274a, 299).

⁵ Governor Cuomo, for example, included establishing official certification protocols for law enforcement agencies in his 2016 State of the State address. See N.Y. ST., 2016 STATE OF THE STATE, *available at* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016_State_of_the_State_Book.pdf. Moreover, the New York City Commission on Human Rights announced that it is accepting requests for U Nonimmigrant Status certifications. See Press Release, Office of the Mayor, Mayor de Blasio Announces NYC Commission on Human Rights First Such Agency in Major U.S. City to Issue U and T Visa Certifications (Feb. 9, 2016) (on file with author).

⁶ See N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, *Immigration and Domestic Violence: A Short Guide for New York State Judges* 3 (Apr. 2009), *available at*

<https://www.nycourts.gov/ip/womeninthecourts/pdfs/ImmigrationandDomesticViolence.pdf#page=5&zoom=auto,-157,148>.

918 Supp B and the common ways they come to family court jurists. It clarifies that I-918 Supp B may be certified at various stages of a case, pursuant to federal law. Part 2 provides answers to some frequently asked questions by family court jurists encountering the certification process. Finally, Part 3 offers guidance on how to complete the I-918 Supp B, setting forth detailed descriptions of each section and specific instructions on how to fill them out.

Part 1: Certification Requests Presented to Family Court Judges, Magistrates and Referees

Under the DHS guidelines, family court judges, referees, and magistrates are certifying authorities for U Nonimmigrant Status purposes.⁷ They have the authority to certify that an applicant “was helpful, is being helpful, or is likely to be helpful in the detection, investigation or prosecution of [qualifying] criminal activity.”⁸

Family court jurists are often in the position of “detecting” criminal activity, consistent with the meaning of criminal activity under the U Nonimmigrant Status statute. Under the statute, domestic violence, abusive sexual contact, felonious assault, blackmail, extortion, and sexual assault are all qualifying criminal activities.⁹ Proceedings in which family courts might encounter qualifying criminal activity include:

- Family Offense Cases, including Temporary Orders of Protection granted *ex parte*;
- Custody, Visitation, and Guardianship Cases, in which domestic violence is alleged or a child has been kidnapped;
- Abuse and neglect proceedings;
- Juvenile Delinquency proceedings;
- Child and Spousal Support proceedings, in which there are allegations of blackmail or extortion;
- Violation Petitions; and
- Other cases where appropriate.¹⁰

Under DHS Guidelines, certification requests may be made at any point in a proceeding and helpfulness means that the person seeking the certification has not “unreasonably refused to cooperate” or “failed to provide information or assistance reasonably requested.”¹¹

Part 2: Frequently Asked Questions

1. Does the signing of a certification form by a family court jurist grant the applicant U Nonimmigrant Status?

No. United States Citizenship and Immigration Services (“USCIS”) makes the determination whether to grant U Nonimmigrant Status after a full application review.¹² Certifications are just one required submission in the complete application for U Nonimmigrant Status.¹³ There are several other eligibility requirements.¹⁴

2. Who initiates the U Nonimmigrant Status certification process?

⁷ See 8 C.F.R. § 214.14(a)(2); 72 Fed. Reg. 53,014, 53,023-53,024 (Sept. 17, 2007).

⁸ DEP’T OF HOMELAND SEC., *U and T Visa Law Enforcement Resource Guide* (last updated Jan. 8, 2016), available at https://www.dhs.gov/xlibrary/assets/dhs_u-visa_certification_guide.pdf (*hereinafter* DHS, Certification Resource Guide). For a list of qualifying criminal activity, see 8 U.S.C. § 1101(a)(15)(U)(iii). This list, however, is non-exclusive.

⁹ See 8 U.S.C. § 1101(a)(15)(U)(iii).

¹⁰ *Id.* at 4; see also N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, *Immigration and Domestic Violence: A Short Guide for New York State Judges* (Apr. 2009) at 3, available at <https://www.nycourts.gov/ip/womeninthecourts/pdfs/ImmigrationandDomesticViolence.pdf#page=5&zoom=auto,-157,148>.

¹¹ DHS Certification Resource Guide, at 18-19.

¹² *Id.* § 1101(a)(15)(U)(i). See also DHS, Certification Resource Guide at 4.

¹³ See 8 U.S.C. § 1184(p) (2014) (setting forth application requirements).

¹⁴ DHS, Certification Resource Guide at 8.

The process for signing the U Nonimmigrant Status certification may be initiated by the certifying authority (e.g. state court) or by an individual seeking the certification. The applicant may be assisted by an advocate or an attorney.¹⁵

3. At what stage of a case can a family court jurist sign a certification?

A family court jurist may sign the I-918 Supp B as soon as the jurist is able to assess a person's helpfulness or willingness to be helpful in the detection, investigation, or prosecution of criminal activity. There is no requirement that a jurist make factual findings prior to signing a certification. Certifications may be signed after the filing of a petition.¹⁶ They may also be signed after a temporary order of protection is granted *ex parte*, but before the order of protection is final.¹⁷ There is no statute of limitations on signing certifications after a case has been closed.¹⁸

4. Must there be criminal charges in order for a family court jurist to sign a certification?

No. There is no statutory or regulatory requirement that an arrest, prosecution, or conviction occur for someone to be eligible to apply for U Nonimmigrant Status.¹⁹ A family court jurist can certify if proceedings are only in family court.²⁰

5. Must the signing family court jurist have been the jurist on the underlying matter to sign a certification?

No. Under the regulations and guidelines, any designated certifying agent or any federal, state, or local judge, magistrate, or referee may sign a certification.²¹ There is no requirement that the signing jurist or agent have dealt with the underlying case.²² A family court jurist may therefore sign a certification in connection with a matter presided over by someone else upon familiarizing themselves with the underlying record and finding sufficient evidence of "helpfulness."²³ This can happen when someone becomes unavailable due to retirement, relocation, or leaving the bench for other reasons.

6. What constitutes "helpfulness" under the U Nonimmigrant Status statute?

The governing statute, 8 U.S.C. § 1101(a)(15)(U), requires certification that an applicant "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of criminal activity. Thus, helpfulness may consist of the applicant's past, current, or future conduct relating to the underlying activity. USCIS regulations require only that "since the initiation of cooperation, the victim has not unreasonably refused to cooperate or failed to provide information and assistance reasonably requested by law enforcement."²⁴ Several examples of "helpful" behavior in family law cases have been identified:

- seeking an order of protection;
- receiving an *ex parte* order of protection;
- receiving an order of protection on consent of all parties;
- reporting violations of an order of protection;

¹⁵ *Id.* at 5.

¹⁶ See N.Y. STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, *Immigration and Domestic Violence: A Short Guide for New York State Judges* at 3. See also 72 Fed. Reg. 53,014, 53,019 ("USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.").

¹⁷ *Id.*

¹⁸ DHS, Certification Resource Guide at 10, 18-19.

¹⁹ *Id.* at 11.

²⁰ *Id.* at 9.

²¹ 8 C.F.R. § 214.14(a)(3)(ii).

²² *Id.*

²³ The family court jurist need only verify the victim's "helpfulness." See DHS, Certification Resource Guide at 4. In one of the few available New York Family Court opinions regarding a U Visa certification, the court issued the requested certification based on a transcript of previous proceedings where the presiding judge had retired. See *In re Rosales*, 40 Misc. 3d 1216(A) (N.Y. Fam. Ct. 2013) (unreported table disposition).

²⁴ DHS, Certification Resource Guide at 18.

- reporting child abuse or neglect;
- reporting elder abuse;
- attempting to report violations of an order of protection unsuccessfully due to a failure to provide an interpreter;
- providing evidence of domestic violence or child abuse or neglect;
- providing information regarding child / elder abuse to protective services / investigators;
- reporting violations of family court custody and visitation orders that involve criminal activity, such as domestic violence;
- providing evidence or testifying in a child or elder abuse or neglect case; or
- providing a history of violence in court papers.²⁵

Conclusion

Following a list of Advisory Council members (Appendix A), this memorandum contains a step-by-step guide for jurists in filling out U Nonimmigrant Status certifications (Appendix B).

We hope that the guidance provided in this memorandum will clarify some of the questions and concerns raised with Council members by the judiciary and by advocates regarding requests for judicial certifications to be submitted to Federal immigration authorities by litigants in conjunction with their applications for U Nonimmigrant Status.

cc.: Hon. Michael Coccoma
 Hon. Fern Fisher
 Administrative Judges
 John W. McConnell
 Ron Younkens
 Hon. Ruben Martino
 Theo S. Liebmann
 Janet Fink

²⁵ Benish Anver, et al., *U-Visa: "Helpfulness"*, NIWAP (Jul. 23, 2015), *available at* <http://library.niwap.org/wp-content/uploads/2015/IMM-Checklist-UVisaHelpfulness-09.25.13.pdf> (enumeration and punctuation added).

APPENDIX A
Advisory Council on Immigration Issues in Family Court (June 2017)¹

Co-Chair: Professor Theo Liebmann, Clinical Professor of Law and Director of Clinical Programs, Hofstra Univ. School of Law

Co-Chair: Hon. Ruben Martino, Supervising Judge, Family Court, Bronx County

Counsel to the Advisory Council: Janet Fink, Esq., Deputy Counsel, NYS Unified Court System

MEMBERS:

1. Bree Bernwanger, Esq., Feerick Center for Social Justice, Fordham University School of Law
2. Hon. Lisa Bloch-Rodwin, Judge of the Family Court, Erie County
3. Margaret Burt, Esq., Attorney, Pittsford, NY
4. Myra Elgabry, Esq., Director, Immigrant Rights Project, Lawyers for Children, New York, NY
5. Anne Erickson, Esq., President and CEO, Empire Justice Center, Albany, NY
6. Hon. Alison Hamanjian, Judge of the Family Court, Richmond County
7. Terry Lawson, Esq.,* Director, Family and Immigration Unit, Bronx Legal Services, Bronx, NY
8. Joanne Macri, Esq., Director of Regional Initiatives, NYS Office of Indigent Legal Services
9. Kathleen Maloney, Esq., Immigration Law Unit, Legal Aid Society, New York, NY
10. Hon. Edwina Mendelson, Acting Supreme Court Justice, New York, NY
11. Andrea Panjwani, Esq., Managing Attorney, My Sister's Place, White Plains, NY
12. Carmen Rey, Esq., Deputy Director, Immigration Intervention Project, Sanctuary for Families, New York, NY
13. Professor Sara Rogerson, Esq., Director, Immigration law Clinic and Law Clinic and Justice Center, Albany Law School
14. Wedade Abdallah, Esq., Assistant Public Defender, Legal Aid Society of Rochester
15. Maureen Schad, Esq., Pro Bono Counsel, Chadbourne and Park, L.L.P.
16. Amelia T. R. Starr, Esq.,* Partner, Davis Polk and Wardwell, L.L.P.
17. Eve Stotland, Esq., Director, Legal Services Center, The Door, New York, NY
18. Trinh Tran, Esq.,* Staff Attorney, Sauti Yetu Center for African Women and Families, Bronx, NY
19. Lee Wang, Esq., Staff Attorney, Immigrant Defense Project, New York, NY

¹ Affiliations are listed for identification purposes only. Members, whose names are marked with an asterisk (*), participated in the U-non-immigrant Status Subcommittee, which was primarily responsible for the preparation of this guidance document.

APPENDIX B

Filling Out the Form I-918 Supplement B, U Nonimmigrant Status Certification

Below is a captioned guide to completing the Form I-918 Supp B. Further resources for completing the U Nonimmigrant Status certification are USCIS website at <https://www.uscis.gov/i-918>, DHS Certification Resource Guide and NIWAP's U Visa: "Helpfulness."


- Print legibly in black ink or type.
- If extra space is needed to complete any item, attach a continuation sheet, indicate the item number, and date and sign each sheet.
- The certifying official makes the initial determination as to the helpfulness of the petitioner. USCIS will give a certification significant weight but it will not be considered conclusory evidence that the victim has met eligibility requirements.

Provide the court's mailing address.

Provide the name of the court's supervising judge

Part 1 is usually filled out by the applicant or applicant's counsel.

A family court judge, magistrate, or referee, is both a "certifying agency" and a "certifying official."

		Supplement B, U Nonimmigrant Status Certification		USCIS Form I-918 OMB No. 1615-0104 Expires 02/28/2019	
Department of Homeland Security U.S. Citizenship and Immigration Services					
For USCIS Use Only	Remarks				
▶ START HERE - Type or print in black or blue ink.					
Part 1. Victim Information					
1. Alien Registration Number (A-Number) (if any)		Name of Head of Certifying Agency			
▶ A- <input type="text"/>		4.a. Family Name (Last Name) <input type="text"/>			
2.a. Family Name (Last Name) <input type="text"/>		4.b. Given Name (First Name) <input type="text"/>			
2.b. Given Name (First Name) <input type="text"/>		4.c. Middle Name <input type="text"/>			
2.c. Middle Name <input type="text"/>		Agency Address			
Other Names Used (Include maiden names, nicknames, and aliases, if applicable.)		5.a. Street Number and Name <input type="text"/>			
If you need extra space to provide additional names, use the space provided in Part 7. Additional Information.		5.b. <input type="checkbox"/> Apt. <input type="checkbox"/> Ste. <input type="checkbox"/> Flr. <input type="text"/>			
3.a. Family Name (Last Name) <input type="text"/>		5.c. City or Town <input type="text"/>			
3.b. Given Name (First Name) <input type="text"/>		5.d. State <input type="text"/> 5.f. ZIP Code <input type="text"/>			
3.c. Middle Name <input type="text"/>		5.g. Province <input type="text"/>			
4. Date of Birth (mm/dd/yyyy) <input type="text"/>		5.h. Postal Code <input type="text"/>			
5. Gender <input type="checkbox"/> Male <input type="checkbox"/> Female		5.i. Country <input type="text"/>			
Part 2. Agency Information					
1. Name of Certifying Agency <input type="text"/>		6. Agency Type <input type="checkbox"/> Federal <input type="checkbox"/> State <input type="checkbox"/> Local			
Name of Certifying Official		7. Case Status <input type="checkbox"/> On-going <input type="checkbox"/> Completed			
2.a. Family Name (Last Name) <input type="text"/>		<input type="checkbox"/> Other <input type="text"/>			
2.b. Given Name (First Name) <input type="text"/>		8. Certifying Agency Category <input type="checkbox"/> Judge <input type="checkbox"/> Law Enforcement <input type="checkbox"/> Prosecutor			
2.c. Middle Name <input type="text"/>		<input type="checkbox"/> Other <input type="text"/>			
3. Title and Division/Office of Certifying Official <input type="text"/>		9. Case Number <input type="text"/>			
		10. FBI Number or SID Number (if applicable) <input type="text"/>			

Form I-918 Supplement B 02/07/17 N Page 1 of 5

If you need extra space to complete this section, use the space provided in Part 7, Additional Information.

<input type="checkbox"/> Abduction	<input type="checkbox"/> Manslaughter
<input type="checkbox"/> Abusive Sexual Contact	<input type="checkbox"/> Murder
<input type="checkbox"/> Attempt to Commit Any of the Named Crimes	<input type="checkbox"/> Obstruction of Justice
<input type="checkbox"/> Being Held Hostage	<input type="checkbox"/> Peonage
<input type="checkbox"/> Blackmail	<input type="checkbox"/> Perjury
<input type="checkbox"/> Conspiracy to Commit Any of the Named Crimes	<input type="checkbox"/> Prostitution
<input type="checkbox"/> Domestic Violence	<input type="checkbox"/> Rape
<input type="checkbox"/> Extortion	<input type="checkbox"/> Sexual Assault
<input type="checkbox"/> False Imprisonment	<input type="checkbox"/> Sexual Exploitation
<input type="checkbox"/> Felonious Assault	<input type="checkbox"/> Slave Trade
<input type="checkbox"/> Female Genital Mutilation	<input type="checkbox"/> Solicitation to Commit Any of the Named Crimes
<input type="checkbox"/> Fraud in Foreign Labor Contracting	<input type="checkbox"/> Stalking
<input type="checkbox"/> Incest	<input type="checkbox"/> Torture
<input type="checkbox"/> Involuntary Servitude	<input type="checkbox"/> Trafficking
<input type="checkbox"/> Kidnapping	<input type="checkbox"/> Unlawful Criminal Restraint
	<input type="checkbox"/> Witness Tampering

2.a. Date (mm/dd/yyyy)

2.b. Date (mm/dd/yyyy)

2.c. Date (mm/dd/yyyy)

2.d. Date (mm/dd/yyyy)

☐ Yes ☐ No

☐ Yes ☐ No

[illegible][illegible]

For example, “Petitioner A reported that he suffered a history of repeated bruises, marks, and other injuries by Respondent B. See attached petition.”

A petitioner is considered to possess information concerning the criminal activity of which he or she is a victim if he or she has knowledge of details concerning the criminal activity.

The standard of cooperation sufficient to constitute helpfulness is low. USCIS regulations require only that the applicant has not refused or failed to provide information and assistance reasonably requested.

Provide an explanation of the applicant's helpfulness to the investigation or prosecution of the criminal activity. Helpfulness can take a broad array of forms (see FAQ 6 for a non-exclusive list of helpful activities).

Part 4. Helpfulness Of The Victim

For the following questions, if the victim is under 16 years of age, incompetent or incapacitated, then a parent, guardian, or next friend may act on behalf of the victim.

1. Does the victim possess information concerning the criminal activity listed in Part 3? ☐ Yes ☐ No
2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above? ☐ Yes ☐ No
3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above? ☐ Yes ☐ No

If you answer "Yes" to Item Numbers 1. - 3., provide an explanation in the space below. If you need extra space to complete this section, use the space provided in Part 7.

Additional Information.

4. Other. Include any additional information you would like to provide.

Part 5. Family Members Culpable In Criminal Activity

1. Are any of the victim's family members culpable or believed to be culpable in the criminal activity of which the petitioner is a victim? ☐ Yes ☐ No

If you answered "Yes," list the family members and their criminal involvement. (If you need extra space to complete this section, use the space provided in Part 7. Additional Information.)

- 2.a. Family Name (Last Name)
- 2.b. Given Name (First Name)
- 2.c. Middle Name
- 2.d. Relationship
- 2.e. Involvement
- 3.a. Family Name (Last Name)
- 3.b. Given Name (First Name)
- 3.c. Middle Name
- 3.d. Relationship
- 3.e. Involvement
- 4.a. Family Name (Last Name)
- 4.b. Given Name (First Name)
- 4.c. Middle Name
- 4.d. Relationship
- 4.e. Involvement

Include information about any family members culpable in the criminal activity.

Part 6. Certification

I am the head of the agency listed in Part 2, or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. Based upon investigation of the facts, I certify, under penalty of perjury, that the individual identified in Part 1. is or was a victim of one or more of the crimes listed in Part 3. I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

1. Signature of Certifying Official (sign in ink)

➡ Don't forget to sign!

2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Sign and date the certification.



U VISA IMMIGRATION RELIEF FOR VICTIMS OF CERTAIN CRIMES

An Overview for Law Enforcement

As a law enforcement official, you play an important role in the application process for U nonimmigrant status (also known as a U visa). The U visa can be a key tool to support your case. The U visa can help certain crime victims feel safer reporting crimes, so that they may be more willing to work with you, even if they do not have lawful immigration status.

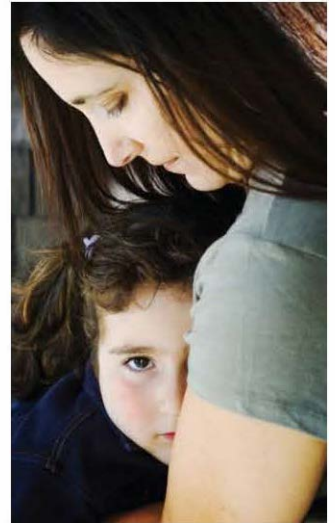
If approved, the U visa provides the victim with:

- temporary immigration status including work authorization;
- temporary immigration status for qualifying family members of the victim; and
- the possibility of lawful permanent resident status.

U VISA ELIGIBILITY

U.S. Citizenship and Immigration Services (USCIS), within the Department of Homeland Security (DHS), decides if a person is eligible for a U visa. Law enforcement does not determine who is eligible for a U visa; however, law enforcement provides information so that USCIS can determine if the person:

- is a victim of a qualifying crime or criminal activity;
- has information about the crime or criminal activity; and
- is, was, or is likely to be helpful in the detection or investigation of the qualifying crime or criminal activity, or the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.



THE ROLE OF LAW ENFORCEMENT



To qualify for a U visa, a victim must submit a signed certification from a law enforcement official. This certification (known as USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification) is evidence in support of the petition to USCIS for U nonimmigrant status. Victims may ask you to complete this certification. The certification gives USCIS basic information about the criminal activity perpetrated against the victim and the victim's willingness to assist in the detection, investigation, prosecution, conviction, or sentencing. You may also encounter victims who could qualify for a U visa but do not know about it. Providing them with information about the U visa may enable them to feel more comfortable working with you.

WHAT CONSTITUTES A QUALIFYING CRIME OR CRIMINAL ACTIVITY?

The following table lists the criminal activities that are considered "qualifying criminal activities" for purposes of U visa eligibility. These are general categories of crimes and it is important to note that any similar criminal activities that violate Federal, state, or local laws may also be considered "qualifying criminal activities" for purposes of U visa eligibility.

- | | | | |
|--------------------------|--------------------------------------|--------------------------|-------------------------------|
| • Abduction | • Female Genital Mutilation | • Obstruction of Justice | • Stalking |
| • Abusive Sexual Contact | • Fraud in Foreign Labor Contracting | • Peonage | • Torture |
| • Being Held Hostage | • Incest | • Perjury | • Trafficking |
| • Blackmail | • Involuntary Servitude | • Prostitution | • Witness Tampering |
| • Domestic Violence | • Kidnapping | • Rape | • Unlawful Criminal Restraint |
| • Extortion | • Manslaughter | • Sexual Assault | |
| • False Imprisonment | • Murder | • Sexual Exploitation | |
| • Felonious Assault | | • Slave Trade | |

Qualifying crimes include any similar activity where the nature and elements of the crime are substantially similar to one of the crimes listed. Attempt, conspiracy, or solicitation to commit any of the crimes listed above may also count as a "qualifying criminal activity."

WHICH LAW ENFORCEMENT AUTHORITIES ARE ELIGIBLE TO CERTIFY?

The following law enforcement authorities are eligible to complete the USCIS Form I-918, Supplement B, U Nonimmigrant Status Certification:

- Any Federal, state, or local law enforcement authority (including prosecutors and judges) that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity.
- If more than one qualifying law enforcement authority is involved in the case, such as a Federal agency and a local agency, any one of them may complete the certification. The law enforcement authority that completes and signs the certification will be considered the “certifying agency” and, therefore, the point of contact for USCIS should any questions about the certification arise.
- Law enforcement authorities with criminal investigative jurisdiction in their respective areas of expertise, including but not limited to child protective services, the Equal Employment Opportunity Commission, and the Department of Labor may also complete the certification.

WHO CAN SIGN A CERTIFICATION?

- The head of the certifying agency.
- Any person in a supervisory role who is specifically designated by the head of the agency to sign.
- A Federal, state, or local judge.

IS ANY LAW ENFORCEMENT AUTHORITY REQUIRED TO COMPLETE A CERTIFICATION?

The decision whether to complete Supplement B is at the discretion of the certifying agency. **However, keep in mind that a victim’s U visa petition will be denied without this certification.**

DOES THE VICTIM AUTOMATICALLY RECEIVE A U VISA BECAUSE A CERTIFICATION HAS BEEN SIGNED?

No. The certification by itself does not grant any immigration benefit. USCIS reviews all of the evidence submitted along with the certification to determine whether a victim is eligible for a U visa. USCIS also conducts a thorough background check of each U visa petitioner (as well as each included family member).



AT WHAT STAGE IN A CRIMINAL CASE CAN A LAW ENFORCEMENT AUTHORITY SIGN A CERTIFICATION?

Law enforcement may sign a certification at any time, including after detection of the criminal activity or while an investigation or prosecution is pending. Keep in mind:

- Law enforcement may sign a certification even after the case is over.
- Law enforcement may sign a certification regardless of how the case turns out. A conviction, prosecution, or arrest is *not* necessary for a victim to be eligible for relief.
- The victim may be eligible for a U visa even if the perpetrator is acquitted or convicted of a different crime.
- Law enforcement may also withdraw the certification if the victim stops cooperating with the investigation or prosecution.

TIPS FOR COMPLETING THE CERTIFICATION

- Find the certification form and instructions at uscis.gov/i-918.
- Use blue ink (preferably) for the signature.
- Submit an original (“wet”) signature—not a photocopy or scan.
- Make sure that Supplement B is completed entirely by the certifying agency.
- Give the completed certification to the petitioner—do not submit it directly to USCIS.

WHO IS RESPONSIBLE FOR PREVENTING U VISA FRAUD?

The USCIS Fraud Detection and National Security Directorate works to ensure that individuals seeking to defraud our immigration system are not granted a U Visa.

WHERE CAN I FIND ADDITIONAL INFORMATION?

Please consult the U and T Visa Law Enforcement Resource Guide:

dhs.gov/publication/u-visa-law-enforcement-certification-resource-guide

USCIS Form I-918, Petition for U Nonimmigrant Status and Instructions: uscis.gov/i-918

For technical assistance: USCIS Office of Policy and Strategy (202) 272-1470

For information about upcoming trainings for law enforcement:

Email the USCIS Public Engagement Division at T_U_VAWATraining@uscis.dhs.gov

For more information about other immigration benefits that may be available to victims, including T nonimmigrant status (T visa) and Violence Against Women Act (VAWA) relief:

uscis.gov/humanitarian

YOUR CERTIFYING OFFICIAL IS:

U VISA LAW ENFORCEMENT RESOURCE GUIDE



**FOR FEDERAL, STATE, LOCAL, TRIBAL AND
TERRITORIAL LAW ENFORCEMENT,
PROSECUTORS, JUDGES, AND OTHER
GOVERNMENT AGENCIES**

CONTENTS



INTRODUCTION	1
<i>Law Enforcement Participation</i>	2
<i>Supporting the Integrity of Our Immigration System</i>	2
<i>Roles and Responsibilities of Certifying Agency, USCIS, and the Victim</i>	3
TOP SIX THINGS TO KNOW ABOUT FORM I-918B	4
U VISA CERTIFICATION	5
<i>Determining Qualifying Criminal Activities</i>	6
<i>Victim of a Qualifying Criminal Activity</i>	8
<i>Victim Must Have Suffered Substantial Physical or Mental Abuse</i>	8
<i>Victim Must Possess Credible and Reliable Information</i>	9
<i>A Victim's Responsibility to Assist</i>	9
<i>Victim Was "Helpful" In the Investigation or Prosecution</i>	9
BEST PRACTICES FOR CERTIFYING AGENCIES AND OFFICIALS.....	11
ANSWERS TO QUESTIONS FREQUENTLY ASKED BY CERTIFYING OFFICIALS.....	13
MORE RESOURCES FOR CERTIFYING AGENCIES AND OFFICIALS	16
APPENDIX: U VISA PROCESS.....	17

The information provided in this Guide is intended for general educational purposes only. It is not intended to provide legal advice. The information in this Guide may or may not apply to individual circumstances. Readers should review local policies and seek legal counsel regarding any specific applications of federal and state laws.

This Guide supersedes all previous versions of the U and U/T Visa Law Enforcement Resource Guides. There is a separate T Visa Law Enforcement Resource Guide.

Promoting a Victim-Centered Approach

DHS strives to use a trauma-informed, victim-centered approach to combat crime. This approach includes practices to minimize victimization and additional trauma, and equally values:

-  The identification and stabilization of victims, including providing immigration relief, and
-  The investigation and prosecution of perpetrators of serious crimes.




For more information and strategies for implementing a victim-centered approach, go to:
<https://www.dhs.gov/blue-campaign/victim-centered-approach>.

INTRODUCTION

Congress recognized that individuals without lawful immigration status may be particularly vulnerable to victimization and may be reluctant to help in the investigation or prosecution of criminal activity due to fear of removal from the United States.¹

Through the Victims of Trafficking and Violence Prevention Act of 2000, Congress created specific immigration benefits, including U nonimmigrant status (also known as the “U visa”) for victims of certain crimes.

U visas:

-  Strengthen law enforcement’s ability to detect, investigate, and prosecute serious crimes, such as domestic violence, sexual assault, and human trafficking;
-  Encourage victims to report crimes committed against them and participate in the investigation and prosecution of those crimes, even if victims lack lawful immigration status; and
-  Offer protections to victims of qualifying crimes in keeping with the humanitarian interests of the United States.

U visas also enable victims of certain crimes to assist investigators or prosecutors by allowing victims to temporarily remain and work in the U.S., generally for 4 years.

U.S. Citizenship and Immigration Services (USCIS) is the federal agency within the Department of Homeland Security (DHS) that adjudicates immigration and citizenship benefits, and has jurisdiction to determine who is eligible for a U visa. Law enforcement agencies assist USCIS by providing certifications on behalf of petitioners seeking U nonimmigrant status. The certification is a tool for law enforcement agencies to use as part of a victim-centered approach.

USCIS provides this guidance to federal, state, local, tribal and territorial law enforcement officers, prosecutors, judges and other government officials who have important roles in identifying and assisting victims, as well as supporting the integrity of the application process for U nonimmigrant status.

This Guide includes information about U visa requirements; the U visa law enforcement certification; best practices for certifying agencies and officials; answers to frequently asked questions from judges, prosecutors, law enforcement agencies, and other officials; additional resources; and contact information for DHS personnel on U visa issues.

¹ See VTPA, Pub. L. No. 106-386, 1502(a)(3), 114 Stat. 1464-1548 (2000).

IN THIS GUIDE



Brief overview of the U visa program, certifying agencies’ roles and responsibilities, and what you need to know before, during, and after certification



Resources to support you, including contact information, best practices, and links to additional information



Answers to frequently asked questions from certifying officials about the discretionary certification process

Law Enforcement Participation

To qualify for the U visa, the victim must provide evidence to USCIS, among other things, establishing that he or she is assisting, has assisted, or will assist law enforcement if assistance is reasonably requested (certain exceptions apply).

One of the required pieces of evidence to establish eligibility for U nonimmigrant status is USCIS Form I-918, Supplement B, “U Nonimmigrant Status Certification” (Form I-918B). While Form I-918B does not confer any immigration benefits or status, it is an essential confirmation that the qualifying crime occurred and that the victim was helpful, is being helpful, or is likely to be helpful in the detection, investigation, or prosecution of the qualifying criminal activity.





Law enforcement agencies play a key role in the certification process, as they are often in the best position to verify whether the reported crime occurred, and to confirm a victim’s helpfulness.

Supporting the Integrity of Our Immigration System

DHS must ensure that the integrity of the U visa program remains strong so that it serves as a valuable tool for law enforcement and continues to provide meaningful protection to victims. DHS takes fraud and abuse of immigration benefits, including U visas, seriously. DHS will refer those who commit U visa fraud for prosecution to the fullest extent of the law.

USCIS works with other DHS components and federal partners to ensure the integrity of our immigration system. USCIS’ fraud detection units investigate cases where there is suspicion of fraud and work with other federal, state, and local law enforcement agencies when fraud or abuse of the program is discovered. If USCIS suspects fraud in a U visa petition, USCIS may reach out to the certifying agency and request further information. Furthermore, USCIS may contact certifying agencies to confirm the accuracy and source of the information submitted to USCIS on Form I-918B.

Law enforcement agencies, who opt to certify, are important partners in supporting the integrity of the U visa program in many ways, including (but not limited to):

-  Attesting that an individual is a victim of a qualifying crime, and whether that individual was, is, or is likely to be helpful to law enforcement’s detection, investigation or prosecution of the crime;
-  Notifying USCIS when a victim refuses or fails to provide assistance when reasonably requested;
-  Informing USCIS of any known criminal and/or gang-related activity; and
-  Alerting USCIS of any suspected fraud.

Note: Please consider USCIS’ recommended best practices (outlined on pages 11-12) when developing certification policies and procedures.

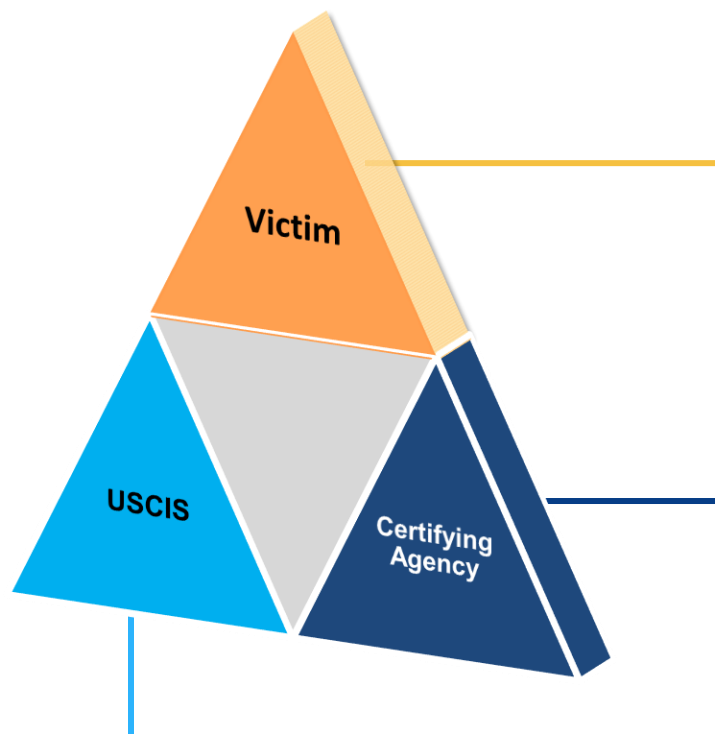
Certifying Agencies

The following types of agencies can certify Form I-918B:

- Any federal, state, tribal, territorial, or local law enforcement office or agency, prosecutor, judge, or other authority that has responsibility to detect, investigate, or prosecute the qualifying criminal activity, or convict or sentence the perpetrator.
 - Agencies with criminal investigative jurisdiction, such as child and adult protective services, the Equal Employment Opportunity Commission, and federal and state Departments of Labor.
-

Roles and Responsibilities of Certifying Agency, USCIS, and the Victim

The certifying agency, USCIS, and the victim each have different roles and responsibilities related to U visas.



Victim

- Provides information to the certifying agency to assist with the investigation or prosecution of qualifying crime(s)
- Has an ongoing responsibility to provide continuing assistance in the investigation and prosecution of a qualifying crime(s), after initially cooperating with law enforcement, when reasonably requested and there is an ongoing need²
- Submits completed Form I-918B (required) with his or her Form I-918 to USCIS

Certifying Agency

- Detects, investigates, and/or prosecutes allegations of qualifying crimes
- Determines, within the certifying agency's discretion, whether to complete and sign Form I-918B, pursuant to the agency's procedures and designated signing authority
- Confirms that the victim is complying with reasonable requests for assistance
- Communicates with USCIS if the victim unreasonably refuses to assist in the investigation or prosecution and the agency needs to withdraw or disavow a previously signed Form I-918B

USCIS

- Receives and adjudicates U visa petitions
- Determines eligibility for U visas based on a complete filing, a criminal history background check, and an immigration status check
- Requests additional information from the victim if necessary to make an eligibility determination
- Coordinates with law enforcement to verify the accuracy of Form I-918B submissions, as well as any other evidence submitted with a U visa petition
- Provides nonimmigrant status to eligible victims

² See the discussion regarding helpfulness within Federal Register DHS Docket No. USCIS-2006-0069 (<https://www.federalregister.gov/documents/2007/09/17/E7-17807/new-classification-for-victims-of-criminal-activity-eligibility-for-u-nonimmigrant-status>).

TOP SIX

THINGS TO KNOW ABOUT FORM I-918B



Completing is Discretionary

1

Signing may strengthen your certifying agency's ability to detect, investigate, and prosecute serious crimes. Your certifying agency has discretion over whether to complete a form, which should be exercised on a case-by-case basis consistent with U.S. laws and regulations, as well as the internal policies of your certifying agency.

*There is **no obligation under federal law** to complete and sign Form I-918B.*

2

Signing Means Attesting to the Facts

By signing the certification, you are stating:

- The individual is a victim of a qualifying criminal activity;
- The individual has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity (or is exempt), and has complied with all reasonable requests to assist law enforcement;
- The information listed on the form is accurate to the best of your knowledge; and
- You have direct knowledge of the information listed (or have reviewed relevant records).

Note: Form I-918B must include an **original signature** in a color other than black.

3

Who Completes the Form Matters

The certifying agency – not the victim, or his or her attorney or representative – should complete Form I-918B. Additionally, only sign Form I-918B if:

- I. You are the head of your agency, or in a supervisory role, and your agency has designated you a “certifying official”;
or
- II. You are a federal, state, local, tribal, or territorial judge.

4

A Victim's Ongoing Responsibility to Assist

Victims have an ongoing responsibility to assist the certifying agency while in U nonimmigrant status. If a victim refuses or fails to assist with reasonable requests, you have the ability to withdraw or disavow your certification by contacting USCIS.

There are some exceptions and special rules for minor (under age 16 for U visas) and disabled victims. Review the Form I-918B instructions for more information.

5

Background Checks and Criminal History

USCIS will consider any information you provide in its analysis of eligibility and admissibility. A criminal history does not automatically render a victim ineligible. Also, your agency is not responsible for determining whether an individual is eligible for an immigration benefit.

Certifying agencies with legal authority may choose to run background checks on individuals prior to signing a certification. Provide USCIS with information in the designated section on the form.


6

You Can Withdraw At Any Time

You can withdraw any time after signing, including if you later discover information regarding the victim, crime, or certification that your agency believes USCIS should be aware of. If you wish to withdraw the certification, email:

LawEnforcement_UTVAWA.VSC@uscis.dhs.gov.

U VISA CERTIFICATION

 For up-to-date USCIS U visa policies, forms, and instructions, see the [U Nonimmigrant Status](#)³ page.

 The [Information for Law Enforcement Agencies and Judges](#)⁴ page is another helpful resource.

Information provided by law enforcement helps USCIS decide whether a victim is eligible for a U visa. This Guide will discuss the eligibility requirements *italicized and highlighted in blue* more thoroughly, as the law enforcement certification focuses on these areas. An individual is eligible for a U visa if he or she:⁵

Is the victim of a qualifying criminal activity (page 8)

Possesses credible and reliable information about the criminal activity (page 9)

Suffered substantial physical or mental abuse as a result of the criminal activity

The crime occurred in the U.S. or violated U.S. law (page 6)

Was helpful, is being helpful, or is likely to be helpful to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity (page 9)

Is admissible to the United States based on a review of his or her criminal history, immigration violations, and other factors

Completing Form I-918B does not automatically confer eligibility for a U visa. USCIS will carefully examine all the evidence provided in a U visa petition, including Form I-918B and any attached records.

Answer Questions Completely: USCIS encourages you to answer all form questions as fully as possible. If there is missing information, the victim may ask that you complete Form I-918B a second time with more information due to a request from USCIS for additional information.

Signing Authority: The head of the agency has the authority to sign certifications or to delegate authority to other agency officials in a supervisory role to sign certifications. Federal, state, local, tribal, or territorial judges have direct authority to sign and may not delegate that authority.

Timing: USCIS must receive the U visa petition **within six months** of the date the certifying agency signed Form I-918B. If USCIS receives the U visa petition from the petitioner or his/her attorney more than six months after the form was signed, the Form I-918B has expired and will not be accepted. In these situations, the victim must request a newly executed Form I-918B to support their petition.

³ <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

⁴ <https://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges>.

⁵ See Immigration and Nationality Act (INA) 101(a)(15)(U); 8 U.S. Code (U.S.C.) 1101(a)(15)(U).

Determining Qualifying Criminal Activities

Congress established the qualifying criminal activities⁶ (listed below) in relation to the U visa. These are categories of crime and are not specific crimes or citations to a criminal code; various federal, state, and local statutes could fall into these general categories of crime.⁷ The one exception is “Fraud in Foreign Labor Contracting,” which is a specifically cited federal offense.⁸

Abduction	Female Genital Mutilation	Murder	Sexual Exploitation
Abusive Sexual Contact	Fraud in Foreign Labor Contracting	Obstruction of Justice	Slave Trade
Blackmail	Hostage	Peonage	Stalking
Domestic Violence	Incest	Perjury	Torture
Extortion	Involuntary Servitude	Prostitution	Trafficking
False Imprisonment	Kidnapping	Rape	Witness Tampering
Felonious Assault	Manslaughter	Sexual Assault	Unlawful Criminal Restraint

The criminal activity must have occurred in the U.S., its territories, or possessions, or have violated U.S. law. It may be relevant to your analysis if the statute of limitations has passed; however, U visa regulations do not set a specific statute of limitations for signing the Form I-918B.

A judge may sign the certification based on having conducted the sentencing in a criminal case. A judge may also sign based on having detected a qualifying crime during a proceeding (criminal or civil) over which he or she presided.

Child abuse and elder abuse could be considered forms of domestic violence if the perpetrator/victim relationship and the abuse experienced by the child, disabled adult, or senior meets the statutory elements of domestic violence under relevant statutes.

In the case of witness tampering, obstruction of justice, or perjury, a person may be considered a victim of these crimes if he or she can reasonably demonstrate that the perpetrator principally committed the offense as a means to avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring him or her to justice, or to further his or her abuse, exploitation of, or control over the immigrant through manipulation of the legal system.

When Similar Criminal Activities May Qualify

There are a wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list of qualifying criminal activities for the U visa, but the nature and elements of those activities are comparable. As such, a victim may also qualify if the crime detected, investigated or prosecuted by a certifying agency involves activity where the nature and elements of the crime are substantially similar to a listed crime.

To determine whether the crime qualifies, USCIS considers information and other documentation provided by law enforcement, such as police reports, charging documents, etc. (if available) regarding the criminal activity that occurred and the statutory violation that it detected, investigated, or prosecuted. USCIS determines whether the crime is substantially similar to a qualifying criminal activity based on the totality of the evidence.

⁶ See INA 101(a)(15)(U)(iii), 8 U.S.C. 1101(a)(15)(U)(iii).

⁷ In addition, a victim may qualify based on an attempt, conspiracy, or solicitation to commit any of the above and other related crimes.

⁸ See 18 U.S.C. 1351.

For example, aggravated robbery and robbery, which are not specifically listed as qualifying criminal activities, could nevertheless be considered a qualifying criminal activity of *felonious assault*, depending on state robbery statutes and evidence of the crime that law enforcement detected, investigated, or prosecuted. For instance, where the state aggravated robbery statute includes assault with a deadly weapon, assault with a threat to cause serious bodily injury, or otherwise includes what could be considered a felonious assault and law enforcement records of the offense show that such an assault actually occurred, USCIS may determine that aggravated robbery is substantially similar to the qualifying criminal activity of felonious assault.⁹

Documenting Crimes Investigated and/or Prosecuted¹⁰

Provide the dates on which the criminal activity occurred.

2.a. Date (mm/dd/yyyy)

2.b. Date (mm/dd/yyyy)

2.c. Date (mm/dd/yyyy)

2.d. Date (mm/dd/yyyy)

3. List the statutory citations for the criminal activity being investigated or prosecuted, or that was investigated or prosecuted.

Briefly describe the criminal activity being investigated and/or prosecuted and the involvement of the petitioner named in Part I. Attach copies of all relevant reports and findings.

Jurisdictions use different terms for criminal activity. Also, each jurisdiction's crime definitions may include slightly different elements. As such, it is important that you provide accurate, precise citations for any crimes you detected, investigated, or prosecuted.

USCIS will examine which qualifying crime(s) you have indicated were detected, investigated, or prosecuted on Form I-918B (more than one qualifying crime may apply) and analyze whether the nature and elements of the crime(s) listed in the statutory citations section are substantially similar to those crimes.

Culpable Individuals Are Not Eligible

An individual is not eligible for a U visa if he or she is culpable for the qualifying criminal activity(ies) being investigated or prosecuted. If you decide to complete a certification for a victim, but you suspect the individual is or may be culpable, you may note your concerns about culpability on the form.

Note: Victims of domestic violence are occasionally accused of committing domestic violence themselves by their abusers as part of the abuser's attempts to assert power and control over the victim. When evidence suggests these allegations were fabricated by the victim's abuser, they do not preclude the victim from qualifying for U nonimmigrant status.

⁹ If the state felony assault statute requires an aggravating factor (e.g., presence/use of a weapon, victim's age or disability, etc.) and no such factor is present, then the crime would generally not be considered substantially similar to felonious assault.

¹⁰ The Form I-918B screenshots depicted in this Guide are from Version 02/07/2017. **Note:** USCIS forms are periodically revised. Check the USCIS website (www.uscis.gov) to ensure that you are certifying the current version of the form.

Victim of a Qualifying Criminal Activity

Various individuals may request certification as a victim, including direct victims and indirect victims.

Direct Victims

The person against whom the crime was perpetrated and who has suffered direct and proximate harm as a result of the commission of qualifying criminal activity. Bystanders who suffer an unusually direct injury as a result of a qualifying crime may also qualify.

Indirect Victims

For a family member to be eligible for a U visa as an indirect victim, all of the following requirements must be met:

- 1) The individual must have a *qualifying family relationship* to the direct victim:
 - a. If the direct victim is age 21 or older at time of crime, his or her spouse and unmarried children under age 21 may qualify
 - b. If the direct victim is under age 21 at the time of the qualifying crime(s), his or her spouse, unmarried children under age 21, parents, and unmarried siblings under age 18 may qualify¹¹;
- 2) The direct victim is unable to assist law enforcement because he or she is:
 - a. *Deceased* due to murder or manslaughter, or
 - b. *Incompetent or incapacitated*, including due to injury, trauma, or age.¹²
- 3) The indirect victim must *meet all other eligibility requirements* for U nonimmigrant status.

Note: You may sign Form I-918B for a non-citizen family member regardless of whether the direct victim is a U.S. citizen or a non-citizen (such as a non-citizen parent of a U.S. citizen child who is the direct victim).

Victim Must Have Suffered Substantial Physical or Mental Abuse

Report information about any known or observed physical or mental harm or abuse sustained by the victim. Indicate whether the victim received any medical care to treat his or her injuries.

USCIS encourages you to attach supplemental documentation related to any injuries sustained (e.g., police reports).

Provide a description of any known or documented injury to the victim. Attach copies of all relevant reports and findings.

USCIS is responsible for determining whether an individual meets this eligibility requirement. USCIS will consider all supporting evidence you provide when determining whether an individual is eligible for U nonimmigrant status, and may request additional information before adjudicating the petition.

¹¹ USCIS considers the age of direct victim at the time the qualifying crime(s) occurred.

¹² For example, USCIS may consider a 13 year old U.S. citizen direct victim to be incompetent or incapacitated due to age, and therefore the parent may assist on the victim's behalf, and may be eligible for a U visa as an indirect victim, if the parent meets all other requirements.

Victim Must Possess Credible and Reliable Information

A victim must possess credible and reliable information, including specific facts about the criminal activity(ies) or events leading up to the victimization. However, when a victim is under 16 years of age on the date the qualifying criminal activity occurred, or a victim is incapacitated or incompetent, a parent, guardian, or next friend¹³ may provide information for them.

A Victim's Responsibility to Assist

A victim seeking a U visa must provide ongoing assistance with the investigation or prosecution related to his or her qualifying crime(s) when reasonably requested, including after reporting a crime and after law enforcement signs Form I-918B. This responsibility continues even if U nonimmigrant status is granted - a victim who does not continue to comply with reasonable requests for assistance will not be eligible for lawful permanent residence based on a U visa.

If your agency chooses to sign Form I-918B for a victim who did not provide ongoing assistance that your agency requested, provide detailed information on Form I-918B. USCIS will decide whether the request was reasonable. Your agency may withdraw or disavow the Form I-918B at any time (including after approval).

Victim Was "Helpful" In the Investigation or Prosecution

Your agency can certify a Form I-918B based on past, present, or the likelihood of a victim's future helpfulness. By signing the form, you are certifying that the victim *has been, is being, or is likely to be* helpful to law enforcement, prosecutors, judges, or other government officials in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.

Similar to the requirement to possess information, when a victim is under 16 years of age, or incapacitated or incompetent and therefore unable to be helpful in the investigation, a parent, guardian, or next friend may also provide the required assistance in place of the victim.

Certifying agencies generally should not sign Form I-918B when the victim has not been helpful or is not likely to be helpful.

You may also decline to certify, for example, if you believe the case will not require assistance from the victim, if the victim has not clearly demonstrated his or her intent to assist as needed, or if the victim's case does not meet your local certifying agency's requirements for signing the form.

¹³A "next friend" is defined as a person who appears in a lawsuit to act for the benefit of a victim who is under the age of 16, or is incapacitated or incompetent, who has suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity. The next friend is not a party to a legal proceeding and is not appointed as a guardian. A next friend does not qualify for a U visa or any immigration benefit, but may provide helpful information about the criminal activity(ies).

In determining whether the victim is, has been, or will be helpful, USCIS considers the facts of each case, including:

- The level of assistance that law enforcement requests of the victim;
- The victim's responsiveness to requests from law enforcement for assistance;
- Law enforcement's ability to proceed with an investigation and/or prosecution based on a victim's helpfulness, or lack thereof, when reasonably requested; and
- The victim's individual circumstances (such as age/maturity, trauma, etc.).

It may also be relevant to the analysis if the statute of limitations has passed. U visa regulations do not set a specific statute of limitations for signing the Form I-918B, or require that a case must have progressed to a certain stage (e.g., prosecution or conviction).

Future Requests

If your agency signed a U visa certification, the victim may request your support in the future for an application to become a lawful permanent resident (i.e., "green card" application). To be eligible for a green card, the victim must demonstrate that he or she did not unreasonably refuse to comply with requests for assistance in the investigation or prosecution since getting a U visa. While re-certification or similar documentation from your agency is not required, it can help the victim meet his or her evidentiary burden. There is no federal requirement that a case must have progressed to a certain stage (e.g., prosecution or conviction) prior to re-certification. Support for a victim's adjustment of status application may be provided even if the case never resulted in a criminal prosecution.



You can choose whether to sign this second certification, but you are not obligated to sign under federal law, regardless of whether your agency certified the victim's helpfulness in the past.

To certify the victim's helpfulness at this stage, you have three options:

- Complete a new Form I-918B;
- Provide a signed letter of support (preferably on agency letterhead), including your badge/identification number, if applicable; or
- Re-sign and newly date a copy of the previously certified Form I-918B.

BEST PRACTICES

FOR CERTIFYING AGENCIES AND OFFICIALS



Establish and Periodically Update Local Procedures and/or Policies

Certifying agencies are not required to have an internal policy or procedure before they can sign a U visa certification. However, USCIS encourages you to develop a policy and train relevant personnel in your agency on that policy to promote consistency and transparency and improve the quality of certifications. Some examples of topics to cover in a certifying agency's internal policy could include:

- Whether the agency will complete discretionary background/criminal checks on a victim before completing a certification (Criminal history does not automatically render a victim ineligible; criminal history is relevant to USCIS' analysis of eligibility and admissibility);
- Whether the agency will establish specific parameters related to certifying cases where a significant amount of time has passed since commission of the crimes (U visa regulations do not set a specific statute of limitations for signing the Form I-918B);
- Expectations regarding attaching relevant police reports and other documentation regarding the victimization and the victim to Form I-918B;
- Procedures regarding the agency's verification of the criminal activity, victimization, and the victim's participation in the investigation or prosecution;
- Procedures to safeguard against fraud, such as requiring that the person who completes and signs the certification is/was not also the investigating officer, and/or in agencies where there are multiple certifying officials, centralizing final review of certifications before they are returned to the victim;
- Procedures for handling future requests for a new or re-signed Form I-918B;
- Establishing general expectations around anticipated response timeframes; and
- Processes for increasing transparency of the agency's certification policies (if any) to the public.

Keep Records of Signed Forms

USCIS may reach out to you or your certifying agency to verify information on a signed Form I-918B. To increase the ease of responding and to provide your own internal data analytics, your agency may find it useful to create and maintain a searchable database or other mechanism to track certification requests and create a historical record of certifications. Some agencies find it useful to include a specific identifier on each page of the form that corresponds to information in the database. For example, a certifying agency could use a meaningful combination of numbers and letters to easily track the signed forms.

Note: Any database should comply with applicable state and federal privacy and confidentiality requirements. DHS, Department of State, and Department of Justice databases should ensure compliance with privacy and confidentiality protections provided by 8 U.S.C. 1367.

USCIS Verifies Proper Signing Authority - Update USCIS When Signing Authority Changes

For U visas, you can assist with this effort by updating USCIS when your certifying agency adds or removes a certifying official by emailing a copy of a signed letter from the head of your agency delegating certifying authority to LawEnforcement_UTVAWA.VSC@USCIS.dhs.gov.

Provide Specific Details

USCIS carefully considers the information you provide on Form I-918B. Be as specific and detailed as possible when answering the form questions.

Note: Completing the form does not automatically confer eligibility. USCIS will assess eligibility by examining all of the evidence provided by the victim in his or her complete U visa petition, including the information you provide on the form as well as supplemental evidence provided by the victim.

Include Any Background Checks Run By Your Certifying Agency on the Form

If your agency chooses to perform any searches on a victim, please note any names and dates of birth (including aliases) run during the certification process, as well as any criminality or national security concerns identified.

Attach Additional Relevant Documents – and Note This on Form I-918B

If available, provide additional relevant documents (e.g., a copy of the police report or court order, or judicial findings, additional statements, photos, etc.) along with the signed form. Note on the form itself that your agency has attached documents, in case the documents and the form are accidentally separated in transit to USCIS.

Verify All Information on the Form Prior to Signing

Your agency should fully complete the certification form. Prior to signing Form I-918B, ensure that all information is complete and accurate.

Provide an Original Ink Signature in a Color Other Than Black

You must provide an original signature on Form I-918B. Also, you should sign in a color of ink other than black (such as blue ink) for verification purposes. USCIS cannot accept photocopies, faxes, or scans of the forms as “official” evidence.

Return the Form to the Victim

Return the signed Form I-918B to the victim. You should not send the signed form separately to USCIS. If the victim is including a certification, the victim is required to send USCIS the original signed certification along with his or her complete U visa petition.

Email USCIS if a Victim Refuses Help DHS and USCIS Safeguard against Fraud and Misuse

If your agency suspects fraud or misuse of the U visa program, you may report these concerns to USCIS by emailing **LawEnforcement_UTVAWA.VSC@USCIS.dhs.gov**. Examples of concerns that should be reported include:

- Individuals reporting qualifying crimes that did not take place;
- Individuals staging qualifying crimes in order to appear eligible;
- Individuals incentivizing others to commit a qualifying crime against them;
- Attorneys, victim advocates, or victims intentionally providing erroneous or misleading information on the forms, or significantly altering the forms after they are signed.

Also, please email USCIS if an individual reporting a qualifying crime refuses or fails to provide information and assistance reasonably requested during the investigation or prosecution.

ANSWERS

TO QUESTIONS FREQUENTLY ASKED
BY CERTIFYING OFFICIALS



Who decides whether a victim should apply for a U visa?

A victim makes this decision. Neither USCIS nor law enforcement determines whether a victim should apply for a U visa.

How may signing a U visa certification benefit my agency?

Signing may strengthen your agency's ability to investigate and prosecute serious crimes, and may encourage victims to report crimes committed against them and to participate in the investigation and prosecution of those crimes.

How does USCIS determine whether an individual is eligible?

Based on a review of the complete petition, USCIS examines the totality of the evidence and circumstances of each individual case. USCIS considers many factors when determining eligibility, including the signed Form I-918B and a full background check, which includes an FBI fingerprint check, a Name/Date of Birth search in federal databases, and immigration status checks.

Can I certify a form for a victim who is no longer in the U.S.?

For U visa eligibility, the criminal activity must have occurred in the U.S., its territories, or possessions, or have violated U.S. law. Victims do not need to be present in the U.S. in order to be eligible for a U visa and may apply when outside of the country.

Why is a victim requesting another certification when my agency previously provided one?

This may occur for primarily three reasons. Victims applying for a U visa must submit Form I-918B within six months after it is signed by a certifying agency. If the Form I-918B expired before the victim was able to file a petition or application with USCIS, he or she would require a new form. Victims may also request another Form I-918B if the original form was incomplete or when significant additional information regarding the investigation or prosecution, the victimization, and/or the victim's helpfulness becomes available.

Additionally, if a victim applies for lawful permanent resident status (i.e. a green card), he or she must demonstrate continued helpfulness as reasonably requested by law enforcement. As evidence of this, a victim may request a newly signed Form I-918B, or other signed document from a law enforcement agency. There is no federal requirement that a case must have progressed to a certain stage (e.g., prosecution or conviction) prior to re-certification.

Can I say "no" to requests?

There are no federal requirements to certify.

Can agencies working with DHS under the 287(g) program certify?

Law enforcement agencies may sign Form I-918B regardless of whether they have a Memorandum of Understanding with DHS under the 287(g) program.

When certifying for an indirect U visa victim, whose name should I list on the form – the direct victim or the indirect victim (family member)?

Always list the name of the person for whom you are certifying in Part 1 (“Victim Information”) of Form I-918B. When certifying Form I-918B for an *indirect victim*, include that individual’s name and other details in Part 1 of the form. Do not put the direct victim’s name in Part 1 when certifying for an indirect victim. Record the direct victim’s name elsewhere in the document. (See form instructions.)

How do I terminate, withdraw, or revoke a certification?

To terminate, withdraw, or revoke a certification, the certifying official should contact USCIS by emailing **LawEnforcement_UTVAWA.VSC@uscis.dhs.gov**. This request should include:

- The certifying agency’s name and contact information;
- Victim’s name and date of birth;
- Victim’s alien registration number (A-number), if known;
- Name of person who signed certification and the date it was signed;
- The reason the agency is withdrawing/disavowing the certification;
- Signature and title of official withdrawing/disavowing; and
- A copy of original certification attached, if available.

Can I run checks (i.e., National Crime Information Center (NCIC)) on those asking for a certification?

Prior to signing Form I-918B, certifying agencies may choose to run background and criminal history checks on individuals asking for a certification, consistent with their legal authority under federal, state, and local law. The fact that a victim has a criminal history does not automatically preclude approval of U nonimmigrant status.

How does USCIS consider criminal history when determining eligibility for a U visa?

Prior to approving or denying a U visa petition, USCIS evaluates each petition on a case-by-case basis. USCIS reviews all available information concerning arrests, immigration violations, gang membership, and security issues before making a final decision. USCIS takes into account whether there is a nexus between a petitioner’s criminal behavior and his or her victimization. USCIS also carefully considers any evidence of rehabilitation that the petitioner provides with his or her U visa petition.

If a certifying official believes USCIS should know something particular about a victim’s criminal history, this information can be included on the certification or with an attached report or statement.

The fact that a victim has a criminal history does not automatically preclude approval of U nonimmigrant status. However, in most cases, an individual will not be able to meet the statutory requirements for approval of a U visa if he or she has a serious or violent criminal record. USCIS also generally will not approve a petition if the victim was complicit or culpable in the qualifying criminal activity of which he or she claims to be a victim.

May I type my responses to Form I-918B?

You may either type or write your response to Form I-918B, except for the signature, **which must be an original and signed by hand in pen in a color other than black**. Please ensure answers are legible.

Does USCIS run background or criminal checks on family members seeking derivative status?

Yes. An individual seeking derivative status as a qualifying family member is subject to the same criminal background review, fingerprint checks, Name/Date of Birth search in federal databases, and immigration status checks as the principal petitioner. USCIS considers the facts of each case separately when determining whether an individual is eligible for a visa. Therefore, USCIS may deny a derivative's case based on his or her adverse criminal or immigration background, even when the principal's petition has been approved.

Which officials meet the definition of a judge for U visa certification purposes?

Any official with delegated authority from a federal, state, local, tribal or territorial court to decide cases including but not limited to: administrative law judges, commissioners, magistrates, aldermen, judicial referees, surrogates, masters, and chancellors.

What training opportunities are available for certifying officials?

USCIS provides webinar trainings for law enforcement officials. Contact T_U_VAWATraining@uscis.dhs.gov to find out information on the next webinar for law enforcement officials. Live, on-site trainings may also be available upon request.

How does USCIS determine if the “substantial physical or mental abuse” requirement has been met?

USCIS will make the determination as to whether the victim has met the “substantial physical or mental abuse” standard on a case-by-case basis during its adjudication of the U visa petition. Certifying agencies and officials may provide any information they deem relevant regarding injuries or abuse on the Form I-918B. If the certifying official has documentary evidence of injuries to the victim, the severity of the perpetrator's conduct, or the emotional impact on the victim's mental health as affected by the criminal activity, it is helpful to attach any relevant evidence of these facts, such as, photographs, police reports, findings, or court orders. While USCIS will consider any evidence of substantial physical or mental abuse provided by the certifying agency, the U visa petitioner has the burden of establishing that they meet the substantial physical or mental abuse requirement.

Some factors that USCIS uses to make this determination are:

- The nature of the injury inflicted;
- The severity of the perpetrator's conduct;
- The severity of the harm suffered;
- The duration of the infliction of the harm; and
- The extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.

The existence of one or more of these factors does not automatically signify that the abuse suffered was substantial.

MORE RESOURCES

FOR CERTIFYING AGENCIES AND OFFICIALS



ICE Homeland Security Investigations (HSI)

This investigative branch of DHS participates in over 120 human trafficking taskforces across the country.

www.ice.gov/contact/hsi/
(866) 872-4973 *or*
victimassistance.ice@ice.dhs.gov

For human trafficking investigations with a transnational nexus, contact HSI by calling your local HSI office or the HSI tip line at 1-866-347-2423 (1-866-DHS-2-ICE).

Office for Civil Rights and Civil Liberties (CRCL):

Toll Free: (866) 644-8360
crcl@dhs.gov *or* VAWA@hq.dhs.gov

Contact CRCL to:

- Refer individuals who would like to file a complaint concerning abuses of civil rights, civil liberties, and profiling on the basis of race, ethnicity, or religion, by DHS employees and officials
- Report a violation of U visa, T visa, or VAWA relief confidentiality protections by a federal employee. See 8 U.S.C. 1367(a)(2).

Office for State and Local Law Enforcement (OSLLE):

(202) 282-9545 *or* OSLLE@hq.dhs.gov

OSLLE serves as the liaison between DHS and non-federal law enforcement agencies across the country. OSLLE leads the coordination of DHS-wide policies related to state, local, tribal, and territorial law enforcement's role in preventing, preparing for, protecting against, and responding to natural disasters, acts of terrorism, and other man-made disaster within the United States.

Request Technical Assistance via the U and T Visa Hotline for Certifying Agency Inquiries:

(202) 272-8178

This line is for certifying agencies only.

Request Training:

T_U_VAWATraining@uscis.dhs.gov

DHS Federal Law Enforcement Training Center
<https://www.fletc.gov/human-trafficking-training-program>

Ask a Question about a Specific Case, Withdraw/Disavow a Signed Form, or Report Concerns about Fraud in or Misuse of U Visas:

LawEnforcement_UTVAWA.VSC@USCIS.dhs.gov
This e-mail is for law enforcement personnel only.

Immigration and Customs Enforcement (ICE) Resources:

ICE Tool Kit for Prosecutors
<https://www.ice.gov/doclib/about/offices/osltc/pdf/tool-kit-for-prosecutors.pdf>

ICE Law Enforcement Support Center
(802) 872-6050
www.ice.gov/contact/lesc

Local ICE Offices
Enforcement and Removal Operations
www.ice.gov/contact/ero/

Office of the Principal Legal Advisor
www.ice.gov/contact/opla/

For Additional Anti-Trafficking Resources, go to the DHS Blue Campaign page:

<https://www.dhs.gov/blue-campaign>

APPENDIX: U VISA PROCESS

This is the general process to seek a U visa, from the victim's initial encounter with law enforcement to USCIS' final eligibility determination. A victim must show that he or she has not refused to comply with reasonable requests for assistance during all stages of the petition process.

The time between initial filing, review for waiting list placement, and the final adjudication of a case (approval or denial) can vary significantly due to several factors, including USCIS staffing levels and resource availability, U visa availability, and number and complexity of petitions and applications.

By law, USCIS cannot provide U nonimmigrant status to more than **10,000** principal victims (i.e., not including derivative family members) per year. This cap has been reached every year since 2010.

Information about U visa petitioners is protected by specific privacy and confidentiality laws.¹⁴

Cooperation Step 1

Victim assists law enforcement in the detection, investigation, and/or prosecution of qualifying crime

Victim requests law enforcement certification and law enforcement decides whether to sign Form I-918, Supplement B

Filing Step 2

Victim applies for U visa with USCIS, including valid law enforcement certification

Waiting List Step 3

USCIS reviews the petition for eligibility and requests more evidence if needed

If determined eligible but the statutory cap for the fiscal year has been met, USCIS places petitioner on a waiting list (and grants deferred action and work authorization if petitioner is in the U.S.)

Approval Step 4

Once a visa is available, USCIS reviews the file to verify eligibility

If determined eligible, USCIS approves the victim's petition for U nonimmigrant status

¹⁴ See 8 U.S.C. 1367.





Supplement B, U Nonimmigrant Status Certification

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-918
OMB No. 1615-0104
Expires 04/30/2021

For USCIS Use Only	Remarks
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► **START HERE - Type or print in black or blue ink.**

Part 1. Victim Information

1. Alien Registration Number (A-Number) (if any)

► A-

2.a. Family Name
(Last Name)

2.b. Given Name
(First Name)

2.c. Middle Name

Other Names Used (Include maiden names, nicknames, and aliases, if applicable.)

If you need extra space to provide additional names, use the space provided in **Part 7. Additional Information.**

3.a. Family Name
(Last Name)

3.b. Given Name
(First Name)

3.c. Middle Name

4. Date of Birth (mm/dd/yyyy)

5. Gender ☐ Male ☐ Female

Part 2. Agency Information

1. Name of Certifying Agency

Name of Certifying Official

2.a. Family Name
(Last Name)

2.b. Given Name
(First Name)

2.c. Middle Name

3. Title and Division/Office of Certifying Official

Name of Head of Certifying Agency

4.a. Family Name
(Last Name)

4.b. Given Name
(First Name)

4.c. Middle Name

Agency Address

5.a. Street Number
and Name

5.b. ☐ Apt. ☐ Ste. ☐ Flr.

5.c. City or Town

5.d. State

5.f. ZIP Code

5.g. Province

5.h. Postal Code

5.i. Country

Other Agency Information

6. Agency Type

☐ Federal ☐ State ☐ Local

7. Case Status

☐ On-going ☐ Completed

☐ Other

8. Certifying Agency Category

☐ Judge ☐ Law Enforcement ☐ Prosecutor

☐ Other

9. Case Number

10. FBI Number or SID Number (if applicable)

Part 3. Criminal Acts

If you need extra space to complete this section, use the space provided in **Part 7. Additional Information**.

1. The petitioner is a victim of criminal activity involving a violation of one of the following Federal, state, or local criminal offenses (or any similar activity). (Select **all applicable** boxes)

- | | |
|---|---|
| <input type="checkbox"/> Abduction | <input type="checkbox"/> Manslaughter |
| <input type="checkbox"/> Abusive Sexual Contact | <input type="checkbox"/> Murder |
| <input type="checkbox"/> Attempt to Commit Any of the Named Crimes | <input type="checkbox"/> Obstruction of Justice |
| <input type="checkbox"/> Being Held Hostage | <input type="checkbox"/> Peonage |
| <input type="checkbox"/> Blackmail | <input type="checkbox"/> Perjury |
| <input type="checkbox"/> Conspiracy to Commit Any of the Named Crimes | <input type="checkbox"/> Prostitution |
| <input type="checkbox"/> Domestic Violence | <input type="checkbox"/> Rape |
| <input type="checkbox"/> Extortion | <input type="checkbox"/> Sexual Assault |
| <input type="checkbox"/> False Imprisonment | <input type="checkbox"/> Sexual Exploitation |
| <input type="checkbox"/> Felonious Assault | <input type="checkbox"/> Slave Trade |
| <input type="checkbox"/> Female Genital Mutilation | <input type="checkbox"/> Solicitation to Commit Any of the Named Crimes |
| <input type="checkbox"/> Fraud in Foreign Labor Contracting | <input type="checkbox"/> Stalking |
| <input type="checkbox"/> Incest | <input type="checkbox"/> Torture |
| <input type="checkbox"/> Involuntary Servitude | <input type="checkbox"/> Trafficking |
| <input type="checkbox"/> Kidnapping | <input type="checkbox"/> Unlawful Criminal Restraint |
| | <input type="checkbox"/> Witness Tampering |

Provide the dates on which the criminal activity occurred.

- 2.a. Date (mm/dd/yyyy)
- 2.b. Date (mm/dd/yyyy)
- 2.c. Date (mm/dd/yyyy)
- 2.d. Date (mm/dd/yyyy)

3. List the statutory citations for the criminal activity being investigated or prosecuted, or that was investigated or prosecuted.

- 4.a.** Did the criminal activity occur in the United States (including Indian country and military installations) or the territories or possessions of the United States?

☐ Yes ☐ No

- 4.b. If you answered "Yes," where did the criminal activity occur?**

- 5.a.** Did the criminal activity violate a Federal extraterritorial jurisdiction statute? ☐ Yes ☐ No

☐ Yes ☐ No

- 5.b. If you answered "Yes," provide the statutory citation providing the authority for extraterritorial jurisdiction.**

6. Briefly describe the criminal activity being investigated and/or prosecuted and the involvement of the petitioner named in **Part 1**. Attach copies of all relevant reports and findings.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 18 lines visible. The paper appears to be a standard notebook page.

7. Provide a description of any known or documented injury to the victim. Attach copies of all relevant reports and findings.

For the following questions, if the victim is under 16 years of age, incompetent or incapacitated, then a parent, guardian, or next friend may act on behalf of the victim.

1. Does the victim possess information concerning the criminal activity listed in **Part 3**? ☐ Yes ☐ No
2. Has the victim been helpful, is the victim being helpful, or is the victim likely to be helpful in the investigation or prosecution of the criminal activity detailed above? ☐ Yes ☐ No
3. Since the initiation of cooperation, has the victim refused or failed to provide assistance reasonably requested in the investigation or prosecution of the criminal activity detailed above? ☐ Yes ☐ No

If you answer "Yes" to **Item Numbers 1. - 3.**, provide an explanation in the space below. If you need extra space to complete this section, use the space provided in **Part 7. Additional Information.**

4. Other. Include any additional information you would like to provide.

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There is no handwriting or other markings on the paper.

Part 5. Family Members Culpable In Criminal Activity

1. Are any of the victim's family members culpable or believed to be culpable in the criminal activity of which the petitioner is a victim? ☐ Yes ☐ No

If you answered "Yes," list the family members and their criminal involvement. (If you need extra space to complete this section, use the space provided in **Part 7. Additional Information.**)

- 2.a. Family Name (Last Name)
- 2.b. Given Name (First Name)
- 2.c. Middle Name
- 2.d. Relationship
- 2.e. Involvement
-
- 3.a. Family Name (Last Name)
- 3.b. Given Name (First Name)
- 3.c. Middle Name
- 3.d. Relationship
- 3.e. Involvement
-
- 4.a. Family Name (Last Name)
- 4.b. Given Name (First Name)
- 4.c. Middle Name
- 4.d. Relationship
- 4.e. Involvement

Part 6. Certification

I am the head of the agency listed in **Part 2.** or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. Based upon investigation of the facts, I certify, under penalty of perjury, that the individual identified in **Part 1.** is or was a victim of one or more of the crimes listed in **Part 3.** I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

1. Signature of Certifying Official (sign in ink)



2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Part 7. Additional Information

If you need extra space to complete any item within this supplement, use the space below or attach a separate sheet of paper; type or print the agency's name, petitioner's name, and the Alien Registration Number (A-Number) (if any) at the top of each sheet; indicate the **Page Number**, **Part Number**, and **Item Number** to which your answer refers; and sign and date each sheet. If you need more space than what is provided, you may also make copies of this page to complete and file with this supplement.

1. Agency Name

--

Petitioner's Name

- 2.a. Family Name**
(Last Name)

--

- 2.b. Given Name
(First Name)**

--

- 2.c. Middle Name**

3. A-Number (if any)

► A-

- 4.a. Page Number

- 4.b. Part Number**

10/10/2016

- 4.c. Item Number**

- 4.d.**

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper appears to be a standard notebook page.

- 5.a. Page Number**

- 5.b. Part Number**

- 5.c. Item Number**

- 5.d.**

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper appears to be a standard notebook page.

- 6.a. Page Number**

- 6.b. Part Number**

- 6.c. Item Number**

- 6.d.**

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are approximately 20 lines visible. The paper appears to be a standard notebook page.



Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons

Department of Homeland Security
U.S. Citizenship and Immigration Services

USCIS
Form I-914
OMB No. 1615-0099
Expires 04/30/2021

START HERE - Type or print in blank ink. This form should be completed by Federal, State, or local law enforcement authorities for victims under the Victims of Trafficking and Violence Protection Act, Public Law 106-386, as amended.

PART A. Victim Information

Family Name (Last Name) Given Name (First Name) Middle Name (if any)

Other Names Used (include maiden name/nickname)

Date of Birth (mm/dd/yyyy)

Gender

☐ Male ☐ Female

A # (if known)

Social Security # (if known)

Part B. Agency Information

Name of Certifying Agency

Name of Certifying Official

Title and Division/Office of Certifying Official

Agency Address - Street Number and Name

Suite Number

City

State/Province

Zip/Postal Code

Daytime Phone # (area code and/or extension)

Fax # (with area code)

(USPS ZIP Code Lookup)

Agency Type

☐ Federal ☐ State ☐ Local

Case Status

☐ On-going ☐ Completed ☐ Local

Certifying Agency Category

☐ Judge ☐ Law Enforcement ☐ Prosecutor ☐ Other

Case Number

FBI or SID Number (if applicable)

Part C. Statement of Claim

1. The applicant is or has been a victim of a severe form of trafficking in persons. Specifically, he or she is a victim of: (Check all that apply. Base your analysis on the practices to which the victim was subjected rather than on the specific violations charged, the counts on which convictions were obtained, or whether any prosecution resulted in convictions. Note that the definitions that control this analysis are not the elements of criminal offenses, but are those set forth at 8 CFR 214.11(a).)

- ☐ Sex trafficking in which a commercial sex act was induced by force, fraud, or coercion. Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.
- ☐ Sex trafficking and the victim is under the age of 18.

For USCIS Use Only

Returned

Receipt

Date

Date

Resubmitted

Date

Date

Reloc Sent

Date

Date

Reloc Rec'd

Date

Date

Remarks

Part C. Statement of Claim (Continued)

- ☐ The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for subjection to involuntary servitude, peonage, debt bondage, or slavery.
- ☐ Not applicable.
- ☐ Other, specify on attached additional sheets.

2. Please describe the victimization upon which the applicant's claim is based and identify the relationship between that victimization and the crime under investigation/prosecution. Attach the results of any name or database inquiry performed in the investigation of the case, as well as any relevant reports and findings. Include relevant dates, etc. Attach additional sheets, if necessary.

3. Has the applicant expressed any fear of retaliation or revenge if removed from the United States? If yes, explain. Attach additional sheets, if necessary.

4. Provide the date(s) on which the acts of trafficking occurred.

Date (mm/dd/yyyy)

Date (mm/dd/yyyy)

Date (mm/dd/yyyy)

Date (mm/dd/yyyy)

5. List the statutory citation(s) for the acts of trafficking being investigated or prosecuted, or that were investigated or prosecuted.

6. Provide the date on which the investigation or prosecution was initiated.

Date (mm/dd/yyyy)

7. Provide the date on which the investigation or prosecution was completed (if any).

Date (mm/dd/yyyy)

Part D. Cooperation of Victim *(Attach additional sheets, if necessary)*

The applicant:

- ☐ Has complied with requests for assistance in the investigation/prosecution of the crime of trafficking. *(Explain below.)*
- ☐ Has failed to comply with requests to assist in the investigation/prosecution of the crime of trafficking. *(Explain below.)*
- ☐ Has not been requested to assist in the investigation/prosecution of any crime of trafficking.
- ☐ Has not yet attained the age of 18.
- ☐ Other, specify on attached additional sheets.

--

Part E. Family Members Implicated In Trafficking

- ☐ Yes ☐ No Are any of the applicant's family members believed to have been involved in his or her trafficking to the United States? If "Yes," list the relative(s) and describe the involvement. Attach additional sheets if necessary.

Full Name	Relationship	Involvement

Part F. Attestation

Based upon investigation of the facts, I certify, under penalty of perjury, that the above noted individual is or has been a victim of a severe form of trafficking in persons as defined by the VTVPA. I certify that the above information is true and correct to the best of my knowledge, and that I have made, and will make, no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services, based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the acts of trafficking of which he/she is a victim, I will notify USCIS.

Signature of Law Enforcement Officer *(identified in Part B) (sign in ink)*Date *(mm/dd/yyyy)*

Signature of Supervisor of Certifying Officer *(sign in ink)*Date *(mm/dd/yyyy)*

Printed Name of Supervisor

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

Policy Number 11064.2: Detention and Removal of Alien Parents or Legal Guardians

Issue Date: August 29, 2017
Effective Date: August 29, 2017
Superseded: ICE Policy 11064.1: Facilitating Parental Interests in the Course of Civil Immigration Enforcement Activities (Aug. 23, 2013) and ICE Policy 11031.1: Juveniles Encountered During Fugitive Operations (Aug. 24, 2007).
Federal Enterprise Architecture Number: 306-112-002b

1. **Purpose/Background.** This Directive provides guidance regarding the detention and removal of alien parents and legal guardians of a minor child(ren), to include those who have a direct interest in family court or child welfare proceedings in the United States. It is intended to complement the detention standards and policies that govern the intake, detention, and removal of alien parents or legal guardians.
2. **Policy.** U.S. Immigration and Customs Enforcement (ICE) personnel are responsible for the prompt and faithful execution of U.S. immigration laws. In pursuing the enforcement of these laws against alien parents and legal guardians of a minor child(ren), or who have a direct interest in family court or child welfare proceedings involving a minor child(ren) in the United States, ICE personnel should remain cognizant of the impact enforcement actions may have on a lawful permanent resident (LPR) or U.S. citizen (USC) minor child(ren). This Directive in no way limits the ability of ICE personnel to make individual enforcement decisions on a case-by-case basis. The security and safety of any ICE employee, detainee, ICE detention staff, or member of the public will be paramount in the exercise of the procedures and requirements of this Directive.
3. **Definitions.** The following definitions apply for the purposes of this Directive only.
 - 3.1. **Family Court or Child Welfare Proceeding.** A proceeding in which a family or dependency court or child welfare agency adjudicates or enforces the rights of parents or minor child(ren) through determination or modification of parenting plans, child custody, visitation, or support, or the distribution of property or other legal obligations in the context of parental rights.
4. **Responsibilities.**
 - 4.1. **The Enforcement and Removal Operations (ERO) Executive Associate Director is responsible for:**
 - 1) Ensuring ERO employees comply with this Directive; and

2) Designating a Child Welfare Coordinator.

4.2. **Field Office Directors (FOD)** are responsible for designating a coordinator at the supervisory level in his or her Field Office to serve as the Field Point of Contact (POC) for the provisions listed in this Directive for his/her area of responsibility (AOR).

4.3. **The Child Welfare Coordinator** is responsible for:

- 1) Serving as the primary point of contact and subject matter expert for all ICE personnel regarding child welfare issues related to detained aliens;
- 2) With the assistance of ERO divisions responsible for data collection and analysis, evaluating, on an ongoing basis, information collected from ENFORCE, the Risk Classification Assessment, and other relevant ICE information technology systems regarding detained alien parents or legal guardians and sharing appropriate information with FODs and Field POCs on an ongoing basis; and
- 3) Providing guidance to FODs and Field POCs on:
 - a) Appropriate initial placement and transfer decisions for detained alien parents or legal guardians;
 - b) Appropriate provisions for escorted trips to family court or child welfare proceedings for detained alien parents or legal guardians;
 - c) Appropriate visitation within ICE facilities; and
 - d) Appropriate efforts, to the extent practicable, to allow a detained alien parent or legal guardian to make arrangements for their minor child(ren), including through increased access to counsel, consular officials, family and dependency courts, child welfare authorities' personnel, and/or family members or friends in order to arrange guardianship, or to obtain travel documents or otherwise make necessary travel arrangements, for his or her minor child(ren).
- 4) Coordinating as necessary with relevant ERO program offices, FODs, state or local family court or child welfare authority personnel, consular officials, and others to facilitate the timely response to issues or complaints received by ICE regarding the child welfare issues of detained aliens.

4.4. **The ERO Field POCs** are responsible for:

- 1) Addressing public inquiries related to the family ties of detained alien parents or legal guardians of a minor child(ren); and
- 2) Communicating with the Child Welfare Coordinator and completing all relevant training.

5. Procedures/Requirements.

5.1. Minor Child(ren) Encountered During Enforcement Actions.

- 1) ICE personnel should not take custody of or transport a minor child(ren) they encounter during an enforcement action who is either a USC or LPR, or who is otherwise not removable from the United States.
- 2) Absent indications of child abuse or neglect, ICE personnel should accommodate, to the extent practicable, an alien parent or legal guardian's efforts to make alternative care arrangements for his or her minor child(ren). ICE personnel should document the alien parent or legal guardian's request for transfer of custody of a USC or LPR minor child(ren) to a verifiable third party.
- 3) If the alien parent or legal guardian cannot make an alternative care arrangement for the minor child(ren), or if there is an indication that the minor child(ren) has been subject to abuse or neglect by a parent or other adult who may be asked to take custody of the minor child(ren), ICE personnel should contact the local child welfare authority or law enforcement agency to take custody of the minor child(ren).
- 4) Once a detained alien has been determined to be a parent or legal guardian of a USC or LPR minor child(ren), ICE personnel should enter this information in ENFORCE Alien Removal Module (EARM), or its successor system.

5.2. Initial Detention Placement and Subsequent Transfers of Detained Alien Parents or Legal Guardians.

- 1) If the alien's minor child(ren) or family court or child welfare proceedings are within the AOR of initial apprehension, the FOD must refrain from making an initial placement or from subsequently transferring the alien outside of the AOR of apprehension, unless deemed operationally necessary and otherwise consistent with applicable ICE policies.

5.3. Participation in Family Court or Child Welfare Proceedings by Detained Alien Parents or Legal Guardians.

- 1) Where practicable, the FOD must arrange for a detained alien parent or legal guardian's in-person appearance at a family court or child welfare proceeding when the detained alien parent or legal guardian's presence is required in order for him or her to maintain or regain custody of his or her minor child(ren) and:
 - a) The detained alien parent or legal guardian, or his or her attorney or other representative, timely requests with reasonable notice an opportunity to participate in such hearings;

- b) The detained alien parent or legal guardian, or his or her attorney or other representative, has produced evidence of a family court or child welfare proceeding, including but not limited to, a notice of hearing, scheduling letter, court order, or other such documentation;
 - c) The family court or child welfare proceedings are located within a reasonable driving distance of the detention facility where the detained alien parent or legal guardian is housed;
 - d) Transportation and escort of the detained alien parent or legal guardian would not be unduly burdensome on Field Office operations; and
 - e) Such transportation and/or escort of the detained alien parent or legal guardian to participate in family court or child welfare proceedings does not present security and/or public safety concerns.
- 2) If it is impracticable to transport the detained alien parent or legal guardian to appear in-person in a family court or child welfare proceeding, the FOD should accommodate the detained alien parent or legal guardian's appearance or participation through video or standard teleconferencing from the detention facility or the Field Office to the extent that it is technologically feasible and approved by the family court or child welfare authority. The detained alien parent shall have the responsibility for obtaining approval from the family court or child welfare agency.
 - 3) All actions taken pertaining to a detainee's participation in family court or child welfare proceedings should be documented in EARM, or its successor system.
 - 4) In all cases, if the detained alien parent or legal guardian does not wish to attend and/or participate in a family court or child welfare proceeding, ICE will not interfere with the detained alien parent or legal guardian's decision, which shall be documented in the detainee's Alien-File (A-File).

5.4. Visitation.

- 1) In the event an alien parent or legal guardian is detained, ICE will facilitate a means of regular visitation between the parent and minor child(ren).
- 2) Pursuant to ICE detention standards, at facilities where there is no provision for visits by minors, upon request, FODs must arrange for a visit by minor child(ren), step-child(ren), child(ren) under legal guardianship, and/or foster child(ren) within the first 30 days. After that time, upon request, ICE must consider a request for transfer, when practicable, to a facility that will allow such visitation. Upon request, FODs must continue monthly visits, if transfer is not approved, or until an approved transfer can be effected.¹

¹ See National Detention Standards 2000 (Section H.2.d); Performance-Based National Detention Standards

- 3) In some cases, parent-child visitation may be required by the family court or child welfare authority in order for a detained alien parent or legal guardian to maintain or regain custody of his or her minor child(ren). If a detained alien parent or legal guardian, or his or her family member, attorney, or other representative produces documentation (e.g., a reunification plan, scheduling letter, court order, or other such documentation) of such a requirement, FODs must facilitate, to the extent practicable, the required visitation between the detained alien parent or legal guardian and his or her minor child(ren).
 - a) Such special visitation may include contact visitation, within the constraints of safety and security for both facility staff and detainees.
 - b) These special arrangements must not limit or otherwise adversely affect the detained alien parent or legal guardian's normal visitation rights under the relevant detention standards, or the safe and efficient operation of the detention facility.
- 4) If in-person visitation is not practicable, FODs may permit parent-child visitation through video or standard teleconferencing from the detention facility or the Field Office to the extent it is technologically feasible and approved by the family court or child welfare authority when visitation is court-ordered.
- 5) All actions documenting parent-child visitation should be recorded in EARM or its successor system. Copies of visitation orders will be placed in the A-File.

5.5. Coordinating Care or Travel of Minor Child(ren) Pending Removal of a Parent or Legal Guardian.

- 1) Where detained alien parents or legal guardians who maintain their parental rights are subject to a final order of removal and ICE is effectuating their removal, FODs or their appropriate designees should accommodate, to the extent practicable, the detained parent or legal guardian's individual efforts to make arrangements for their minor child(ren). Such provisions may include the parent or legal guardian's attempt to arrange guardianship for his or her minor child(ren) to remain in the United States, or to obtain travel documents for the minor child(ren) to accompany them to their country of removal.
- 2) FODs must coordinate, to the extent practicable, within their local detention facilities and within the Field Office to afford detained alien parents or legal guardians access to counsel, consulates and consular officials, courts and/or family members in the weeks preceding removal in order to execute signed documents (e.g., powers of attorney, passport applications, appointments of guardians, or other permissions), purchase airline tickets, and make other necessary preparations prior to removal.

- 3) In addition, the FOD may, subject to security considerations, provide sufficient notice of the removal itinerary to the detainee or through the detained alien's attorney or other representative so that coordinated travel arrangements may be made for the alien's minor child(ren).

6. Recordkeeping.

- 6.1. Court documentation, visitation orders, and family law case files will be maintained as part of the A-File. A-Files will be retained permanently and transferred to the National Archives after 100 years in accordance with the U.S. Citizenship and Immigration Services A-File records schedule (N1-566-08-011).
- 6.2. Information related to minor child(ren) encountered during enforcement actions and family court or child welfare proceedings will be stored in the Enforcement Integrated Database and retained for 75 years in accordance with DHS records schedule Biometric with Limited Biographical Data (DAA-0563-2013-001) item 6, Law Enforcement.

7. Authorities/References.

- 7.1. Executive Order 13,768, "Enhancing Public Safety in the Interior of the United States," 82 Fed. Reg. 8799 (Jan. 30, 2017).
- 7.2. Memorandum from DHS Secretary John Kelly, "Enforcement of the Immigration Laws to Serve the National Interest" (Feb. 20, 2017).
- 7.3. 2011 Performance-Based National Detention Standards.
- 7.4. 2008 Performance-Based National Detention Standards.
- 7.5. 2000 National Detention Standards.

8. Attachments. None.

9. **No Private Right Statement.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



Thomas D. Holman
Acting Director
U.S. Immigration and Customs Enforcement

SELECT EXCERPTS:
NEW YORK RULES OF PROFESSIONAL CONDUCT

Rule 1.1. Competence

- (a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- (b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
- (c) A lawyer shall not intentionally:
- (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
 - (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer

- (a) Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client.
- (e) A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client.
- (f) A lawyer may refuse to aid or participate in conduct that the lawyer believes to be unlawful, even though there is some support for an argument that the conduct is legal.

(g) A lawyer does not violate these Rules by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, and by treating with courtesy and consideration all persons involved in the legal process.

Rule 1.7. Conflict of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

- (1) the representation will involve the lawyer in representing differing interests; or
- (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 1.8. Current Clients: Specific Conflict of Interest Rules

(a) A lawyer shall not enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client, unless:

- (1) the transaction is fair and reasonable to the client and the terms of the transaction are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
- (2) the client is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel on the transaction; and
- (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not:

- (1) solicit any gift from a client, including a testamentary gift, for the benefit of the lawyer or a person related to the lawyer; or
- (2) prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any gift, unless the lawyer or other recipient of the gift is related to the client and a reasonable lawyer would conclude that the transaction is fair and reasonable.

For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to conclusion of all aspects of the matter giving rise to the representation or proposed representation of the client or prospective client, a lawyer shall not negotiate or enter into any arrangement or understanding with:

- (1) a client or a prospective client by which the lawyer acquires an interest in literary or media rights with respect to the subject matter of the representation or proposed representation; or
- (2) any person by which the lawyer transfers or assigns any interest in literary or media rights with respect to the subject matter of the representation of a client or prospective client.

(e) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client; and
- (3) a lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the lawyer from the proceeds of the action may include an amount equal to such costs and expenses incurred.

(f) A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the client, from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and
- (3) the client's confidential information is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, absent court approval, unless each client gives informed consent in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking, and is given a reasonable opportunity to seek, the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil matter subject to Rule 1.5(d) or other law or court rule.

(j)(1) A lawyer shall not:

(i) as a condition of entering into or continuing any professional representation by the lawyer or the lawyer's firm, require or demand sexual relations with any person;

(ii) employ coercion, intimidation or undue influence in entering into sexual relations incident to any professional representation by the lawyer or the lawyer's firm; or

(iii) in domestic relations matters, enter into sexual relations with a client during the course of the lawyer's representation of the client.

(2) Rule 1.8(j)(1) shall not apply to sexual relations between lawyers and their spouses or to ongoing consensual sexual relationships that predate the initiation of the client-lawyer relationship.

(k) Where a lawyer in a firm has sexual relations with a client but does not participate in the representation of that client, the lawyers in the firm shall not be subject to discipline under this Rule solely because of the occurrence of such sexual relations.

Rule 1.9. Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 or paragraph (c) of this Rule that is material to the matter.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or

(2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

Rule 4.3. Communicating With Unrepresented Persons

In communicating on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

NY Eth. Op. 1069 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2015 WL 5471442

New York State Bar Association
Committee on Professional Ethics

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS REPRESENTATION

Opinion Number 1069

August 19, 2015

DIGEST: Despite the potential for conflict, a lawyer who represents an immigrant child in federal administrative removal proceedings may simultaneously represent the proposed guardian in a state family court proceeding provided that the lawyer reasonably believes he can competently and diligently represent both clients simultaneously, and the lawyer obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

*1 Rules 1.0(e), (f) & (j), 1.7(a) & (b), 1.14, 4.2, 4.3

Modifies: N.Y. State 274 (1972), N.Y. State 256 (1972)

FACTS

1. A lawyer represents an immigrant child (the “child”) in administrative removal proceedings before a federal Immigration Judge in New York. The object of this representation is to prevent the child from being deported to the child's country of origin.

2. To prevent the child's deportation, the lawyer is assisting the child in pursuing a form of relief from removal known as Special Immigrant Juvenile Status (“SIJS”), defined under [8 U.S.C. § 1101\(a\)\(27\)\(J\)\(i\)-\(iii\)\(2009\)](#).¹ The statute provides that an immigrant who is present in the United States and is under the age of 21 and unmarried can achieve lawful permanent residency by fulfilling the following requirements:

- the immigrant has been declared dependent on a juvenile court located in the United States;
- administrative or judicial proceedings have determined that
- reunification with one or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law; and
- it would not be in the immigrant's best interest to be returned to the immigrant's or parent's previous country of nationality or country of last habitual residence.

3. In New York, the most common way to have a child declared “dependent on a juvenile court” and to seek an administrative or judicial determination on the SIJS requirements of “reunification” and “immigrant's best interest” is to file a petition pursuant to Article 6 of the New York Family Court Act proposing the appointment of a guardian. The proposed guardian may be a

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

relative, family friend, or anyone who is willing to care for the child and look out for the child's best interests until the child has reached the age of twenty-one. The proposed guardian often is already the caretaker for the child, but needs a court order to have complete control over the care and best interests of the child. See *In Re Diaz v. Munoz*, 118 A.D.3d 989, 990-991, 989 N.Y.S.2d 52, 54 (2d Dep't 2014).

*2 4. When a proposed guardian retains a lawyer, the lawyer assists the proposed guardian by advising in the preparation of the Family Court petition, filing the petition and other required documentation with the Family Court, and representing the proposed guardian during the Family Court proceedings. The Family Court proceedings often require testimony from both the proposed guardian and the child. The testimony typically revolves around whether the proposed guardian is suitable to be appointed as the guardian.

5. During the guardianship proceedings, the proposed guardian is potentially adverse to the child's parent(s). The proposed guardian is seeking to gain control over decision-making for the child, while the child's parents will be giving up their parental rights. In these proceedings the child is called the ““subject child,” and is not considered an adverse party. However, the child's interests may be inconsistent with those of the parents or the proposed guardian, or both. To protect the interests of the child, the Court will sometimes appoint an attorney for the child.

6. After the Family Court decides whether to appoint the proposed guardian, the guardian (if the guardian has been approved) or the appointed lawyer for the child (whether or not the guardian has been approved) may make a motion to the Family Court to request a determination called “Special Findings” regarding the child's eligibility for SIJS. If the Family Court determines that the child meets the statutory requirements, the court will issue an Order of Special Findings.

7. After the Family Court proceedings have concluded, the lawyer representing the child before the federal Immigration Judge then takes the final Order of Guardianship and Order of Special Findings from the Family Court and files Form I-360 (Petition for Special Immigrant) with U.S. Citizenship and Immigration Services (“USCIS”), a branch of the Department of Homeland Security. If the application is approved by USCIS, the child will receive lawful permanent residency in the United States and the administrative removal proceedings will be terminated.

QUESTION

8. May a lawyer who represents a child in an administrative removal proceeding in federal Immigration Court act as the lawyer for a proposed guardian of the child in an Article 6 guardianship proceeding in New York Family Court?

OPINION

9. The focus of the question is whether representing both the proposed guardian in Family Court and the child in Immigration Court would create an impermissible conflict of interest. Conflicts of interest with current clients are governed by Rule 1.7, which provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
(1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

*3 (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

10. The issues raised under this inquiry are therefore (1) whether representing the child in one proceeding and the prospective guardian in another would involve the lawyer in representing “differing interests” and, if so, (2) whether the lawyer “reasonably believes” the lawyer can “provide competent and diligent representation” to each client (the child and the proposed guardian), and, if so, (3) whether it is possible to obtain informed consent from the child, who is a minor.

Would the Lawyer be Representing “Differing Interests”?

11. Under the definition of “differing interests” in Rule 1.0(f), “differing interests” include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse or other interest.” Differing interests can arise even if the lawyer does not represent the guardian and the child in the same proceeding.

12. Differing interests may arise in many ways. For example, if the child does not want a guardian appointed, or if the child wants someone other than the proposed guardian to be appointed, then differing interests exist between the child and the proposed guardian, and the lawyer has a conflict of interest under Rule 1.7(a)(1).

13. In many guardianship proceedings, however, we understand that the child and the proposed guardian will share a common goal - the child wishes to have the proposed guardian appointed by the court in order to help defend the immigration proceeding² and the proposed guardian desires to be the legally appointed guardian for the child. However, despite the common goal, the child and the proposed guardian may have differing interests that would adversely affect the lawyer's professional judgment.

14. For example, one potential source of conflict is that the Family Court may require an investigation of the guardian, including the guardian's relationship with the child, the guardian's criminal history, and any allegations of abuse. It is in the child's best interest for this investigation to be thorough, whereas the proposed guardian may want to limit the investigation. Another potential source of conflict is that, as counsel to the guardian, the lawyer needs to advise the guardian of the legal responsibilities that accompany guardianship (e.g. potential responsibility for the costs of the child's health care, or potential liability for damages if the child vandalizes the property of others). The child may want the lawyer to downplay the risks so that the proposed guardian does not become frightened and back out, whereas the proposed guardian presumably wants to understand all of the risks in light of his or her own personal and financial circumstances.

*4 15. In some cases, a reasonable lawyer may conclude that differing interests do not exist (for example, if the proposed guardian has been caring for the child for a long time, and both the child and the proposed guardian want to formalize the existing relationship by obtaining a court appointment for the guardian). Even when the interests of the guardian and the child appear to be consistent, circumstances may change. The family court proceeding currently appears to be one undertaken to advance the child's interests in the federal immigration proceeding. However, this proceeding involves factors upon which the child may

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

have strong and changeable opinions — in particular, allegations of abuse, neglect, abandonment, or similar conduct, against one or both of the child's parents. The possibility of a desired change of course in the future by a child cannot be dismissed out of hand. The lawyer thus must be sensitive to changes that might create differing interests. Such potential changes will be addressed if the family court appoints separate counsel for the child in the family court proceeding.

16. In N.Y. State 836 (2010), we addressed whether a single lawyer could represent both an incapacitated person and his guardian in a proceeding to terminate the guardianship. The attorney had previously represented the incapacitated person (then an “alleged incapacitated person”) in connection with the appointment of a guardian. At the time of the inquiry, the parties' interests seemed to be aligned, since both parties said they believed that the guardianship should be terminated. However, we expressed a concern that the guardian might be seeking to escape the responsibilities of the guardianship because he wished to move across the country, even though the incapacitated person would be better served by continuing the guardianship. Consequently, we determined that, in order to undertake the joint representation, the lawyer had to meet the conditions of Rule 1.7(b). We opined that the lawyer could reasonably conclude that he could provide competent and diligent representation to both parties, and that the lawyer could therefore undertake the dual representation, as long as he obtained informed consent from each client, confirmed in writing. Finally, in N.Y. State 836, we warned that obtaining informed consent would require the lawyer to fully inform each party of the possible risks of the dual representation.

17. We reach the same conclusion in this opinion that we did in N.Y. State 836, i.e. in many cases representing the immigrant-child and the prospective guardian will involve representing potentially differing interests, and the lawyer must consider whether he or she can adequately represent both and obtain informed consent.

18. If the inquirer here believes he can adequately represent both the prospective guardian in the family court proceeding and the child in the immigration proceeding, then, in order to undertake the joint representation, the lawyer must comply with the conditions of Rule 1.7(b), including obtaining the consent of both clients, confirmed in writing.

*5 19. We note that some courts and advocacy groups believe that the lawyer should not represent both the guardian and the child in the same proceeding. See Special Immigrant Juvenile Status, A Step-By-Step Guide for Safe Passage Project Volunteer Attorneys (Updated November 23, 2014) (“Safe Passage Project Guide”) ³ (taking the position that the same attorney cannot represent both the prospective guardian and the child in the state court guardianship proceeding); ⁴ Westchester County Family Court, “Frequently Asked Questions” regarding SIJS-related guardianship applications, available on the website of the Office of Court Administration (Court views representation of both the child and the guardian as a conflict of interest. Lawyer for child may assist the guardian in preparing the petition for guardianship, but cannot represent both child and guardian in the guardianship proceeding. ⁵). While these groups and courts may believe that it is best practice for the lawyer not to represent both the child and the guardian, and while the conditions in Rule 1.7 may be difficult to meet, the only per se conflict of interest in Rule 1.7 is that in subparagraph (b)(3), which prohibits a lawyer from representing a client who has a claim against another client the lawyer represents in the same proceeding before a tribunal. Representing the child and the guardian does not fall under that per se prohibition; thus the simultaneous representation of the child and the guardian is non-consentable only if it falls under subparagraph (b)(1). This opinion applies in those situations where the lawyer can meet the conditions in Rule 1.7(b) (1), and sets forth additional requirements that apply because the child is a client with “diminished capacity” In our view, if the child has a separate lawyer for the guardianship proceeding, then the impact of any differing interests will be diminished, and a reasonable lawyer could conclude that the lawyer can provide competent and diligent representation to the proposed guardian in the Family Court and to the immigrant-child in the Immigration Court. However, if such representation violated any court rules, it might violate Rule 8.4(d) (lawyer shall not engage in conduct that is prejudicial to the administration of justice).

May a Minor Consent to a Conflict of Interest?

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

20. Some of our older opinions concluded that a minor cannot consent to dual representation. See N.Y. State 274 (1972) (consent cannot be obtained where one of the parties is an infant); N.Y. State 256 (1972) (an infant cannot consent to dual representation, so if a conflict of interest exists, then dual representation would violate [DR 5-101\(A\)](#)). The opinions do not explain why a minor cannot give consent. Presumably, the principle stems from an assumption that a child does not have the ability to make reasoned decisions. We do not give opinions on matters of law, but we understand that consent by a minor may be voidable at the request of the minor. This is no different from other advance consents to conflicts under the Rules. See Rule 1.7, Cmt. [21] (client who has consented to a conflict may revoke the consent and terminate the lawyer's representation at any time).

*6 21. Nevertheless, when the Rules were adopted in 2009, they included, for the first time, special provisions on clients with “diminished capacity,” including as a result of minority. See Rule 1.14. Rule 1.14 does not assume that a child cannot consent to conflicts. See, e.g. Cmt. [1] (“When the client is a minor ... maintaining the conventional client-lawyer relationship may not be possible in all respects. In particular, a severely incapacitated person may have no power to make legally binding decisions. Nevertheless, a client with diminished capacity often has the ability to understand, deliberate upon and reach conclusions about matters affecting the client's own well-being.”); Comment [4] (“whether the lawyer should look to the parents as natural guardians may depend on the type of proceeding or matter in which the lawyer is representing the minor.”)

22. In N.Y. State 836 ¶¶ 11-12 (2010), we concluded that the lawyer could obtain consent from the incapacitated person to a dual representation if such person could make a reasoned decision to consent. We said:

When obtaining informed consent from Client, Lawyer must take special care because Client is presently deemed to be incapacitated and under guardianship. However, three sources — Rule 1.14 [of] our Rules of Professional Conduct, our prior opinion in N.Y. State 746, and New York's Mental Hygiene Law — all support the conclusion that Client may consent to this dual representation despite Client's present legal designation of incapacity. Of course, Lawyer must carefully assess Client's capacity to understand the conflict and to make a reasoned decision whether to consent to the representation despite the conflict. This careful assessment is necessary because if Client's capacity to make reasoned decisions is so diminished that she cannot give informed consent to the dual representation, then Lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4). If a lawyer cannot satisfy the informed consent requirement of Rule 1.7(b)(4), then the lawyer cannot undertake the dual representation.

23. Similarly, in N.Y. State 1059 (2015), where we were considering whether a lawyer may disclose certain confidential information of an unaccompanied child, we held that a minor can consent to disclosure of confidential information if the minor is capable of understanding the risks of disclosure and of making a reasoned judgment. Nevertheless, we warned that it may not be possible for all children to give consent:

First, very young children will be incapable of giving consent. There is no particular age when children can be said to have capacity to give consent. The New York City Bar ethics committee observed in an opinion dealing with “verbal minors ages twelve or older who affirmatively seek a lawyer's assistance” that such clients “generally will be capable of making considered judgments concerning the representation.” N.Y. City 1997-2 (citing, *inter alia*, Standard for Attorneys and Guardians Ad Litem in Custody or Visitation Proceedings § 2.2 (Am. Academy of Matrimonial Lawyers 1995) for the proposition that there is “a rebuttable presumption that children above the age of twelve are competent”). But the children that are the inquirers' clients may be less capable of making considered judgments than the clients in N.Y. City 1997-2, given that the unaccompanied children who are the inquirers' clients are likely to be unfamiliar with American society, or may be more capable of making considered judgments, given their experiences in their home countries and during their unaccompanied trip to the United States.

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

*7 24. We stressed in that opinion that the lawyer must make full disclosure of information adequate for the child to make an informed decision, and must adequately explain the material risks of the proposed course of conduct and reasonably available alternatives. We also advised that the extent of the information needed and risks to be addressed would vary both with the nature of the information being disclosed and the sophistication of the child. Finally, we warned that the client's consent must be voluntary. As this Committee observed in N.Y. State 490 (1978), lawyers providing services to indigent clients "should be particularly sensitive to any element of submissiveness on the part of their indigent clients," and such requests should be made only under circumstances where the lawyer is satisfied that the client could refuse to consent without any sense of guilt or embarrassment.

25. We are aware of a number of opinions of New York courts holding that a child may not consent to dual representations. See, e.g. [Key v. Arrow Limo Inc.](#), 2014 W.L. 3583893 (Sup. Ct., Kings Co. 2014); [Christie v. Kramer](#), 2012 WL 5898054 (Sup. Ct., Kings Co. 2012). However, these cases involve whether a lawyer may represent both a parent-driver and a child involved in an automobile accident, under circumstances where the lawyer will have to sue the parent on behalf of the child (to benefit from the parent's auto insurance policy) or waive the right to sue the parent. In such cases, the courts have found that the differing interests of the parent and child are so severe that the conflict of interest is non-consentable. We do not believe such is the case here.

26. Even before the adoption of Rule 1.14, the courts recognized the ability of children to make decisions affecting their own interests. In 2007 the Chief Judge of New York made it clear that unless a child is incapable of expressing a preference or clearly and unequivocally lacks the capacity to perceive and comprehend the consequences of his or her decisions, or the child's articulated position would place the child at imminent risk of serious harm, the attorney must not "substitute judgment" in determining and advocating the child's position, even if the attorney believes that what the child wants is not in the child's best interests. [Rules of the Chief Judge, § 7.2](#). See NYSBA Standards for Attorneys Representing Children in New York Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings (2014) at p. 46:

The attorney may not use substituted judgment merely because the attorney believes that another course of action would be "better" for the child. Thus, each child should be assessed individually to determine if he or she has the capacity to make decisions that bind the attorney with respect to fundamental issues such as whether the child wishes to be adopted.

27. The same analysis applies here. The lawyer must assess whether the child has the capacity to make a reasoned decision regarding the potential conflict. Comment [6] to Rule 1.14 advises that the lawyer should consider and balance such factors as (i) the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; and (ii) the consistence of a decision with known long-term commitments and values of the client. With a child, the age of the child will also be a factor. If the lawyer concludes that the immigrant-child is capable of making a reasoned decision, the lawyer must provide the child with information and explanations suitable to the child's level of understanding.

CONCLUSION

*8 28. A lawyer who represents an immigrant child in a federal administrative removal proceeding may simultaneously represent a proposed guardian in a state Family Court proceeding provided the lawyer reasonably believes he can competently and diligently represent both clients, and obtains informed consent from each client, confirmed in writing. The lawyer may accept the consent of the child if the lawyer believes (i) the child has the capacity to understand the conflict and to make a reasoned decision to consent, and (ii) the consent is voluntary. While there is no particular age when a child may be said to have such capacity, verbal children aged 12 and older will generally be capable of making such reasoned decisions after the lawyer makes full disclosure of the material risks and reasonably available alternatives.

TOPIC: CONFLICT OF INTEREST; SIMULTANEOUS..., NY Eth. Op. 1069 (2015)

Footnotes

- 1 Avoiding deportation is not the only reason for applying for SIJS status. Without legal immigration status, the immigrant-minor cannot receive working papers, and is ineligible for college financial aid and other government benefits.
- 2 The lawyer must determine that this is truly the child's wish. The lawyer may not substitute his or her judgment for that of the child. See N.Y.S.B.A. Standards, *infra*, ¶ 26.
- 3 The Safe Passage Project is a 26 U.S.C. § 501(c)(3) not-for-profit corporation housed within New York Law School, which trains pro bono attorneys to represent children in need of immigration assistance. Safe Passage Project Guide, p. 5.
- 4 The Safe Passage Project Guide states recommends only representing the child, and helping the guardian to fill out certain forms: "It is important to understand is [sic] that you, as an attorney, do not represent the proposed guardian in this proceeding. However, you should talk to the proposed guardian about the process, assist him or her in filling out the paperwork, and discuss what to expect when filing the petition and appearing in Family Court. Nonetheless, the proposed guardian is not your client. If you would like to represent the proposed guardian in the family court proceedings you can choose to do so but you will not be able to represent the youth in the family court. An attorney will be appointed for the youth. But note that you may find your communication and access to the youth is now severely restricted because you will have to communicate through the attorney for the child. We recommend that you remain solely counsel for the youth." Safe Passage Project Guide at p. 19. We note, without opining on the applicability here, that Rule 4.3 prohibits a lawyer from giving legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client.
- 5 The questions include whether the lawyer may represent the child and prepare the petition on behalf of the proposed guardian. This apparently refers to dual representation in the guardianship proceeding and not to simultaneous representation of the child in the immigration proceeding and the guardian in the family court proceeding. The court answers that it views representation of both the child and the guardian as a conflict of interest: "Although it may be a practice or service of your organization to assist the guardian in preparing the petition for guardianship, you cannot represent both parties. You must make it clear to the Court who you are representing. Therefore, the Court will always assign an attorney for the subject child from the attorneys for children panel. If you choose to act as co-counsel with such attorney, an attorney for the proposed guardian will be assigned."

NY Eth. Op. 1069 (N.Y.St.Bar.Assn.Comm.Prof.Eth.), 2015 WL 5471442