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IMMIGRATION REMEDIES FOR VICTIMS OF CRIME

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Scope Note

This chapter advises the lawyer on avenues for relief for crime victims who are immigrants. Its scope is directed to survivors of crime outside the context of domestic relations. The various visa types are discussed, along with the paths that they provide toward permanent residency. Application procedures are set forth in detail.

§ 34.1 INTRODUCTION

This chapter concerns immigration relief for immigrant survivors of crimes outside of the domestic violence context. Federal laws provide a safety net for survivors of crime, including a T visa, a U visa, and special immigrant juvenile (SIJ) status. In sum, the T visa provides a temporary visa that can lead to legal permanent residence to persons who are **trafficked** and who assist law enforcement. Similarly, the U visa is available to victims of **human trafficking** and other crimes who cooperate with law enforcement. Child victims of **human trafficking** or other crimes may be eligible for a quicker path to residency than the T visa, through SIJ status, or SIJS, which is available to certain abused, abandoned, and neglected noncitizen children who are declared dependents of a state juvenile court. Depending on the circumstances, other forms of relief may be available as well, such as the Violence Against Women Act (VAWA) self-petition for certain spouses, children, and parents of U.S. citizen or lawful permanent resident abusers or asylum for those fleeing persecution in another country, including domestic violence and other gender violence, under the social group claim of asylum. This chapter outlines only the T and U visas as they pertain to victims of crime other than domestic violence.

§ 34.2 T VISA

§ 34.2.1 Legislative Enactments

In October 2000, Congress passed the Victims of **Trafficking** and Violence Protection Act of 2000 (VTVPA), Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified at INA §§ 101(a)(15)(T), 101(a)(15)(U), 214(n), 214(p), 245(l), and 245(m)), which included the **Trafficking** Victims Protection Act of 2000 (TVPA) (Pub. L. No. 106-386). Prior to the enactment of the TVPA, there was no comprehensive federal law that offered protection to victims of **trafficking** or to prosecute their **traffickers**. **Human trafficking** is reportedly the fastest-growing source of profit for organized criminal enterprises worldwide, and profits from the **trafficking** industry contribute to the expansion of organized crime in the United States and worldwide. Many federal agencies have partnered to fight **human trafficking**, including the U.S. Departments of Homeland Security (DHS), State (DOS), Justice (DOJ), Health and **Human** Services (HHS), Defense (DOD), and Labor (DOL).

The TVPA was renewed through the **Trafficking** Victims Protection Reauthorization Act (TVPRA) of 2003 with a $200 million authorization to combat **human trafficking**. The TVPRA augmented legal remedies to include actual and punitive damages against **traffickers** and included sex **trafficking** and forced labor as offenses under the racketeering influenced and corrupt organization statute. On December 12, 2008, the William Wilberforce **Trafficking** Victims Protection Act of 2008 reauthorized the **Trafficking** Victims Protection Act of 2000. Pub. L. No. 110-457, 122 Stat. 5044 (2008).

Practice Note

Under the reauthorization, A-3 and G-5 visa holders were added. Holders of A-3 and G-5 visas are nonimmigrant attendants, servants, or personal employees of ambassadors, diplomats, consular officers, foreign government officials, or international organization officers. This small population was added to the existing list of groups eligible for deferred action to allow A-3 or G-5 nonimmigrants to resolve pending litigation they have filed regarding a violation of the terms of their employment contract or conditions related to **human trafficking** and similar violations.

§ 34.2.2 Goals of the TVPA: Prevention, Protection, and Prosecution

The goals of the TVPA were set forth as threefold: prevention, protection, and prosecution. More specifically:

· prevent **human trafficking** overseas in the form of economic, educational, and public awareness programs;

· protect victims and help them rebuild their lives in the United States with federal and state support in the form of reintegration programs, assistance programs, immigration relief, and victims' relief funds; and

· prosecute **traffickers** of persons under severe federal penalties with redefined crimes, creation of new crimes of **trafficking** into slavery or forced labor and sex, and increased sentencing.

§ 34.2.3 TVPA Benefits and Services

Victims of **trafficking** are eligible for benefits and services under federal or state programs once they become certified by the U.S. Department of Health and **Human** Services (DHHS), including access to housing, education, health care, job training, and other federally funded social service programs available to assist victims. Adult **trafficking** victims must be certified as a precondition for their eligibility for benefits and services. Once certified, they are eligible to apply for benefits and services under the federal- or state-funded programs to the same extent as refugees, including refugee cash, medical assistance, and social services. Victims under age eighteen do not need to be certified. DHHS issues these victims letters of eligibility so that providers know they are eligible for services and benefits.

§ 34.2.4 Protection Through Immigration Relief

The TVPA created the T visa, which allows victims of **trafficking** to become temporary residents of the United States. The T visa is a four-year visa that gives the holder the right to live and work in the United States. T visa holders are eligible to apply for lawful permanent residence (i.e., a "green card") after three years with the visa, or sooner if the related investigation or prosecution is complete. The TVPA authorizes up to 5,000 victims of **trafficking** each year to receive permanent resident status after three years from issuance of their temporary residency visas.

A T visa applicant must demonstrate that he or she

- is or has been a victim of a severe form of **trafficking** in persons;
- is physically present in the United States on account of such **trafficking**, including those who have been allowed entry into the United States for participation in an investigative or judicial process associated with **trafficking**;
- has complied (with some exceptions) with any reasonable request for assistance in the federal, state, or local investigation or prosecution of acts of **trafficking**-related crimes (or that the victim has not attained eighteen years of age); and
- would suffer extreme hardship involving unusual and severe harm in the event of removal.

INA § 101(a)(15)(T)(i), 8 U.S.C. § 1101(a)(15)(T)(i).

The statute also provides for derivative status for certain family members. INA § 101(a)(15)(T)(ii), 8 U.S.C. § 1101(a)(15)(T)(ii). If the primary T visa applicant (i.e., the **trafficking** victim) is an adult over age twenty-one, any spouse or children under twenty-one of that applicant can apply as derivatives. If the primary T visa applicant (**trafficking** victim) is under age twenty-one, his or her spouse, children, unmarried siblings under age eighteen (at the time of application), and parents can apply for a T visa as derivatives. INA § 101(a)(15)(T)(ii), 8 U.S.C. § 1101(a)(15)(T)(ii).

§ 34.2.5 Defining Trafficking

Under the TVPA, **human trafficking** is comprised of sex **trafficking** and labor **trafficking**. 22 U.S.C. § 7101(b)(2), (3). Sex **trafficking** is the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act. 22 U.S.C. § 7102(9). The term "severe **trafficking** in **humans**," which triggers many protections under the TVPA, includes sex **trafficking** in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained eighteen years of age. 22 U.S.C. § 7102(8)(A).

Labor **trafficking** is defined as "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 22 U.S.C. § 7102(8)(B). The act defines "commercial sex act" as any sex act on account of which anything of value is given to or received by any person.

The TVPA is significant in that it does not require the use of physical force for the exploitation to be a severe form of **trafficking**. Importantly, the law specifically addresses the subtle means of coercion used by **traffickers**, including psychological coercion, trickery, and the seizure of documents— activities that were difficult to prosecute under preexisting involuntary servitude statutes and case law. Fraud and coercion are recognized means by which **traffickers** can enslave their victims. 22 U.S.C. § 7102(8)(A), (B). ""Coercion" is defined by threats of serious harm to or physical restraint against any person; or any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or the abuse or threatened abuse of the legal process. 22 U.S.C. § 7102(2). These definitions are particularly significant in the immigration context because many victims cooperate due to threats of deportation or arrest or of harm to their families.

Also of heightened importance in the immigration context is the distinction between **trafficking** and smuggling. **Human** smuggling involves an agreement to facilitate entry into the country without permission. **Human trafficking** may start as smuggling, but becomes **trafficking** when some further controlling conduct is involved, placing the victim into a slavery-like situation.

§ 34.2.6 Prosecution

Prosecution was strengthened under the TVPA by making **human trafficking** a distinct federal crime with severe penalties. These laws apply whether victims are undocumented or U.S. citizens, lawful residents, or persons otherwise present in the United States with permission. **Traffickers** can be subject to federal criminal charges and survivors have a private right of action to sue their **traffickers**. Heightened penalties include scenarios such as the following:

- If a **trafficking** crime results in death or if the crime includes kidnapping, an attempted kidnapping, aggravated sexual abuse, attempted aggravated sexual abuse, or an attempt to kill, the **trafficker** could be sentenced to life in prison.
- **Traffickers** who exploit children (under age fourteen) using force, fraud, or coercion for the purpose of sex **trafficking** (a commercial sex act) can be imprisoned for life.
- If the victim was a child between ages fourteen and eighteen and the sex **trafficking** did not involve force, fraud, or coercion, the **trafficker** could receive up to twenty years in prison.

Practice Note

Prior to the TVPA enactment, the only protection victims were afforded was under the S visa provision of the INA. The S visa (commonly called the " "snitch" visa) allows for temporary immigration status for one who possesses "critical reliable information concerning a criminal organization ...." 8 U.S.C. § 1101(a)(15)(S)(i)(I) (2001). However, S visas are limited to 200 annually and are not frequently used.

§ 34.2.7 Application Procedure

Applicants for T visas must file an application for T nonimmigrant status using Form I-914 with the U.S. Citizenship and Immigration Services (USCIS) Vermont Service Center. A complete application includes the following:

· the proper fees or a request for a fee waiver;
· three current photos;
· evidence that the principal applicant has been a victim of a severe form of **trafficking** (the application must include the applicant's statement as to how he or she was victimized by **traffickers**);
· evidence that the applicant is physically present in the United States on account of being a victim of a severe form of **trafficking**;
· evidence either (1) that the applicant has complied with a reasonable request for assistance made by a law enforcement agency that investigates and prosecutes **traffickers**, or (2) that the applicant is not yet fifteen years of age;
· evidence that the applicant would suffer extreme hardship if he or she were removed from the United States; and
· individuals who are inadmissible also need to apply for a waiver by submitting Form I-192 (Application for Advance Permission to Enter as a Nonimmigrant).

Practice Note

To be eligible for a T visa, a person who was the victim of **trafficking** before October 28, 2000 (the date on which the TVPA became law) must have applied for a visa within one year of January 31, 2002, or show exceptional circumstances. A person who was a child (unmarried and under age twenty-one) when he or she was victimized must have filed within one year of his or her twenty-first birthday or within one year of January 31, 2002. For filing purposes, the victimization will be deemed to have occurred on the last day in which an act constituting an element of the **trafficking** act occurred. The applications of persons who miss these deadlines will be considered if evidence is provided that "exceptional circumstances" prevented a timely filing. An example of such circumstances, set forth by the government, is a person having suffered severe psychological or physical trauma that delayed the application.

(a) ***Physical Presence***

An application for a T visa must show that the applicant is physically present in the United States, American Samoa, the Mariana Islands, or a port of entry on account of having been the victim of a severe form of **trafficking** in persons. Persons may be considered to be physically present on account of **trafficking** if they were the victims of **trafficking** in the past and their continued presence is directly related to **trafficking**. **Trafficking** victims who have left the United States voluntarily after having been **trafficked** and then have returned are not considered to be physically present on account of **trafficking** unless they returned as victims of a new incidence of **trafficking**.

The regulations require that **trafficking** victims who escaped the **trafficking** situation before a law enforcement agency got involved show that they did not have a clear chance to leave the United States in the interim. For example, they must show that psychological trauma, or injury, or lack of resources, or lack of access to travel documents prevented them from leaving the United States after they escaped from the **trafficking** situation.

(b) ***Law Enforcement Agency Endorsement***

The applicant should also submit a law enforcement agency (LEA) endorsement or evidence that the DHS has arranged for the applicant's continued presence in the United States. The endorsement is not mandatory, but it constitutes primary evidence that the applicant is a victim of a severe form of **trafficking** and has not unreasonably refused to assist an investigation or prosecution. An LEA endorsement is made on Supplement B to Form I-914 and consists of a declaration made by an officer of a federal law enforcement agency that investigates or prosecutes person-**trafficking** crimes.

Although an LEA endorsement is not a requirement, the USCIS strongly recommends that applicants obtain one. Applicants who do not submit an endorsement must submit an explanation describing their attempts to obtain one and why their request was refused. If the USCIS determines that an applicant has not complied with a reasonable request for assistance from an LEA, the application will be denied or an approved application will be revoked.

Credible secondary evidence and affidavits may be submitted with the T visa application to explain why the applicant was unable to submit an LEA endorsement. Secondary evidence must include an original statement by the applicant showing why an LEA endorsement is unavailable. Statements or evidence submitted by the applicant must show

· that an LEA that is charged with detecting, investigating, or prosecuting **trafficking** crimes knows about the **trafficking** situation the applicant was involved with; and

· that the applicant complied with any reasonable request for assistance made by the LEA (if the applicant did not report the **trafficking** crime at the time it occurred, he or she must explain why).

Applicants who have never had contact with an LEA are not eligible for a T visa.

T visa applicants who are under age fifteen need not have assisted with an investigation or prosecution in order to be eligible for lawful status. However, such applicants must provide evidence of their age. Primary evidence of age includes a birth certificate, passport, or certified medical opinion. Secondary evidence includes documents described in 8 C.F.R. § 103.2(6)(2)(i), such as church or school records.

(c) ***Evidence of Hardship if Removed***

An applicant must demonstrate that he or she would face "extreme hardship involving unusual and severe harm" if he or she was removed from the United States. The extreme hardship involving unusual and severe harm is not to be based upon current or future economic detriment, or the lack of, or disruption to, social or economic opportunities. Factors that have traditionally been taken into account in making such determinations in the context of suspension of deportation and cancellation of removal cases provide guidance as to the standard, as well as factors that are associated with the applicant's having been a victim of a severe form of **trafficking** in persons. Such extreme hardship-related factors could include the following:

· the applicant's age and personal circumstances;

· any serious physical or mental illness from which the applicant suffers and whether treatment for such illness is "reasonably available" in the applicant's country of origin;

· the nature and extent of any physical or psychological consequences of the applicant's having been the victim of a severe form of **trafficking** in persons;

· the impact on the applicant of losing access to the U.S. courts and criminal justice system, including access to criminal and civil redress for **trafficking** crimes of which the applicant was a victim;

· "[t]he reasonable expectation that the existence of laws, social practices, or customs in the foreign country to which the applicant would be returned would penalize the applicant severely for having been the victim of a severe form of **trafficking** in persons";

· the likelihood that the applicant would again become the victim of **trafficking**, including whether the government of the applicant's country of origin could or would protect the applicant from being revictimized;

· the likelihood that the **trafficker** or the **trafficker's** agents would harm the applicant once the latter was back in his or her country of origin; and

· the likelihood that the applicant's individual safety would be seriously threatened by the existence of civil unrest or armed conflict in the applicant's country of origin.

(d) ***Waivers of Inadmissibility***

The regulations provide that applicants for a T visa who are inadmissible are not eligible for T status unless they can obtain a waiver. Section 212(d)(3) of the INA gives the INS general authority to waive most of the grounds of inadmissibility for nonimmigrants. In addition, INA § 212(d)(13) gives the attorney general additional authority to waive most grounds of inadmissibility for victims of **trafficking** where he or she finds it to be in the national interest to grant a waiver. It is to be expected that many victims of **trafficking** will need waivers because of the very circumstances that make them victims. Waivers are submitted through Form I-192, Application for Advance Permission to Enter as Nonimmigrant, with a fee or fee waiver request, at the time of the filing of the I-914 application.

§ 34.2.8 In Proceedings

Persons in pending immigration proceedings who intend to apply for a T visa are expected to notify government counsel of their intentions. A **trafficking** victim may request that proceedings be administratively closed or that a motion to reopen or reconsider be indefinitely continued to allow him or her to file an application. If the individual appears to be eligible for a T visa, the immigration judge or the Board of Immigration Appeals (BIA) (whoever has jurisdiction) may grant the request to close the matter or continue the motion indefinitely. If USCIS later finds the individual to be ineligible for a T visa, DHS may recommence proceedings by filing a motion to recalendar. If the individual is in custody, he or she may be detained until it renders a decision on the T visa application.

Practice Note

By memorandum dated June 17, 2011, issued by USCIS Director Morton, a renewed call for prosecutorial discretion in removal proceedings was announced (Morton Memorandum). An interagency team was assembled to implement the use of prosecutorial discretion consisting of DHS, the Executive Office for Immigration Review (EOIR), and the Office of Immigration Litigation at the Department of Justice (DOJ). The purpose of the team is to identify "low priority" removal cases in all stages before, after, and during removal proceedings, with "low priority cases" being defined as cases not

involving "criminal aliens, those who pose a threat to public safety and national security, repeat immigration law violators or others." Once identified, beneficiaries of prosecutorial discretion can receive a stay on removal proceedings and may be eligible for work authorization.

Individuals with final orders of removal are not precluded from filing T visa applications, but filing a T visa application has no automatic effect on the execution of a final order. An applicant may request a stay of removal under 8 C.F.R. § 241.6(a), and if USCIS determines that the person's application is bona fide, it will automatically stay the execution of the order. Such stay will remain in effect until a final decision is made on the T visa application. Note that the government will not count the period of time that the stay is in effect in determining whether the individual's continued detention under a final order is reasonable under the standards of 8 C.F.R. § 241.4.

If the T visa application is denied, the stay is lifted as of the date of the denial, regardless of any appeal. If, on the other hand, USCIS grants the application, the final order is cancelled as of the date of the approval.

§ 34.2.9 Adjustment of Status

On December 12, 2008, the DHS published regulations that govern the process by which T and U visa holders apply to adjust their status to that of lawful permanent resident (codified at 8 C.F.R. §§ 245.23 and 245.24). These long-awaited regulations, which went into effect on January 12, 2009 (and were published as an interim final rule with request for comments), set forth that a T visa holder seeking to apply for permanent residency must demonstrate that he or she

- was admitted as a T nonimmigrant;
- has been continuously physically present in the United States for three years, from the date of admission as a T nonimmigrant (alternatively, applicants can file for adjustment before accruing three years of continuous physical presence if the DOJ certifies that the investigation or prosecution is complete);
- complied with any reasonable requests for assistance *or* that he or she would suffer extreme hardship involving unusual and severe harm upon removal;
- has maintained good moral character while in the United States;
- is admissible to the United States; and
- meets a discretionary threshold, i.e., that adjustment of status is justified for humanitarian reasons, in the public interest, or to assure family unity.

§ 34.2.10 Transition Rule

A limited number of T and U visa applicants fall into a category of being ineligible to adjust status because they may have been out-of-status when their application was approved. By statute, T and U visa status cannot exceed four years, unless exceptional circumstances are demonstrated. Several T nonimmigrants were approved more than four years ago and certain U nonimmigrants, who obtained interim relief, accrued more than four years of status. This issue was addressed in the adjustment regulations, which provided a transition period for applicants who had accrued more than four years in status waiting for the issuance of the adjustment regulations. T visa applicants were to file a complete adjustment application within ninety days of the effective date of the rule (January 12, 2009) and U visa applicants had 120 days from the date of the approval of their nonimmigrant application (Form I-918).

§ 34.3 U VISA

§ 34.3.1 Summary of Purpose and Requirements

The U nonimmigrant classification (U visa) is available to noncitizen victims of certain criminal activity, including **human trafficking**, who help government officials in investigating or prosecuting such criminal activity. The U visa encompasses a wider range of crimes than the T visa. Like the T visa, the U visa results in permission to work and live in the United States for four years, as well as the ability to obtain U visa status for certain "derivative" family members. Also like the T visa, the U visa provides eligibility for permanent resident status after three years. Unlike the T visa, which requires an alien's physical presence in the United States as a condition of eligibility, alien victims of qualifying criminal activity can apply for such status from inside or outside the United States.

The express purpose of the U visa is "to strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and **trafficking** in persons, while offering protection to alien crime victims in keeping with the humanitarian interests of the United States." *See* "New Classification for Victims of Criminal Activity; Eligibility for 'U' Nonimmigrant Status," Interim rule, Summary, 72 Fed. Reg. 53014 (Sept. 17, 2007).

A U visa applicant must demonstrate that

- he or she has suffered substantial physical or mental abuse as a result of having been a victim of certain criminal activity (listed below);
- he or she possesses information concerning the relevant criminal activity (or in the case of an alien child under age sixteen, the parent, guardian, or next friend of the alien possesses this information);
- he or she (or in the case of an alien child under age sixteen, the parent, guardian, or next friend of the alien) has been

helpful, is being helpful, or is likely to be helpful to federal, state, or local authorities investigating or prosecuting the relevant criminal activity; and

· the relevant criminal activity violated the laws of the United States or occurred in the United States (including in Indian country and military installations) or the territories and possessions of the United States.

INA § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i).

"Qualifying" criminal activity includes one or more of the following or any similar activity in violation of federal, state, or local criminal law: rape; torture; **human trafficking**; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above-mentioned crimes. INA § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii).

Practice Note

USCIS advises that practitioners note that "attempt or solicitation" to commit any of the designated crimes qualify as well. In the case of a U visa petitioner who is twenty-one years of age or older, his or her spouse and children under age twenty-one may qualify for derivative status. If the crime victim/petitioner is under age twenty-one, the petitioner's spouse, children, unmarried siblings under age eighteen at the time of application, and parents may qualify for U nonimmigrant status as """"derivatives."

Practice Note

For a child crime victim, a parent can do the I-918. For the I-485, the Vermont Service Center instructs that the parent can simply re-sign the I-918.

§ 34.3.2 Background of U Visa

The VAWA 2000 contained amendments that created the U visa. These provisions addressed one of the largest statutory gaps of the VAWA law by providing immigration relief for victims of violence who could not qualify under the VAWA because they never married their abusers or their abusers were undocumented or only had some form of temporary status. Of particular note for the U visa is the fact that those victims of domestic violence who cannot otherwise qualify for self-petitioning under VAWA may qualify for relief under the U visa.

Practice Note

Title IV of the Violence Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (Sept. 13, 1994), and the Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (Sept. 13, 1994), were amended by Title V of the Victims of Violence and **Trafficking** Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000), the Battered Immigrant Women Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1518 (Oct. 28, 2000), found in the Violence Against Women Act of 2000, Pub. L. No. 106-386, div. B., 114 Stat. 1464 (Oct. 28, 2000), and enacted on October 28, 2000.

The protections under VAWA 2000 are more inclusive than under VAWA 1994, including the marriage provisions and expansion of defining relationships outside of the traditional arrangements, allowing relief for immigrants in same-gender relationships involving violence, employer-related abuse, and acquaintance or random sexual assault. Unlike the VAWA self-petition, however, the U visa contains a provision for a certification by a law enforcement official that the applicant "has been helpful, is being helpful, or is likely to be helpful" to an investigation or prosecution of the criminal activity in question. INA §§ 101(a)(15)(i)(III), 214(o). This requirement may prove to be a significant obstacle to immigrants who are wary of participating in a criminal investigation or prosecution of their perpetrator, especially where they have family in the home country to which an abuser would be sent if deported.

Practice Note

While VAWA does not statutorily require cooperation with law enforcement, in practice VAWA petitions often need such documentation of the abuse in order to be successful.

The law recognizes that a victim's cooperation, assistance, and safety are essential to the effective detection, investigation, and prosecution of crimes. Victims who fear deportation, however, are often unlikely to come forward to assist in investigative efforts. The U visa can be an incentive to come forward by providing immigrant victims of certain crimes temporary legal status as well as temporary work eligibility in the United States. While police agencies play an important role

by certifying that an individual is eligible to apply for a U visa, applications are ultimately approved or denied by the USCIS.

§ 34.3.3 Interim Relief and Deferred Action

The use of "interim relief" was implemented during the seven-year period between the passage of the VTVPA (2000) and the issuance of the interim final rule (2007). The delay created a period of uncertainty for individuals seeking U visa immigration benefits. In 2001, INS issued guidance on interim relief that contained procedures to be followed while regulations implementing the T and U visa status were pending. See **Exhibit 34A** for a comparison of T and U eligibility requirements.

The guidance memorandum provided that until final regulations, applicants identified as victims would not be removed from the United States, and existing authority mechanisms such as parole, deferred action, and stays of removal would be used. Thus, U visas were governed by an August 30, 2001 memorandum detailing a process for "interim relief." *See* memorandum from Walter Cronin, "Victims of **Trafficking** and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—'T' and 'U' Nonimmigrant Visas" (Aug. 30, 2001).

Roles shifted from INS to USCIS after the formation of DHS in 2002. In 2003, with regulations still pending, USCIS issued a memorandum about the U nonimmigrant process, stating that a "more unified, centralized approach is needed in the interim relief process." USCIS centralized interim U visa relief at the Visa Service Center (VSC). *See* memorandum from William R. Yates, "Centralization of Interim Relief for U Nonimmigrant Status Applicants" (Oct. 8, 2003).

Interim final regulations containing procedures for victims seeking U visa status were issued on September 17, 2007, clarifying filing procedures for U visa applicants and establishing Form I-918 (Petition for U Non-Immigrant Status), to be filed with the VSC. USCIS assured that it would not reevaluate previous grants of deferred action, parole, and stays of removal, and extended interim relief until the agency completed the adjudication of the U visa applications.

Practice Note

U visa applicants who filed for interim relief could continue to apply for work authorization, but individuals who applied after the interim final rule was implemented could not apply while their applications were pending.

§ 34.3.4 Waitlists

U visas are limited to 10,000 issued each year for primary applicants. This limitation does not apply for qualifying derivative family members.

In the first year that U visas were issued under final guidance, the cap of 5,000 visas was reached (by July 2010). In 2013, the cap was reached within the first three months that the visas were available. Approved cases, not issued visas, are placed on a waiting list and those cases are placed into deferred action. When USCIS issues notice that a case has been placed on a waiting list, deferred action notice should be issued simultaneously and applicants are also eligible for employment authorization. The work authorization eligibility category is 8 C.F.R. § 274a.12(c)(14) and can be filed any time after the notice of deferred action is received. When the visas become available and those on the waiting list are approved, principals will automatically receive an EAD card under the (a)(19) category. Qualifying family members seeking work authorization will need to file a new Form I-765 under the (a)(20) category.

§ 34.3.5 Evidence and Documentation

When filing the petition for U nonimmigrant status (Form I-918) (find revised Form I-918, updated, at http://www.uscis.gov), the applicant must provide information regarding the petitioner's eligibility for such status, as well as admissibility to the United States. Documenting the "substantial mental and physical abuse" is done in a manner similar to that used to document battering and extreme mental cruelty for battered spouse self-petitions and I-751 waiver petitions. An application should include a detailed affidavit of the client, medical records, court and police records, letters of support from counselors, and corroborating statements from neighbors or others.

The petition for U nonimmigrant status must be filed by the alien victim and also contain a certification of helpfulness from a certifying agency. That means the victim must provide a U nonimmigrant status certification (Form I-918, Supplement B) from a federal, state, or local law enforcement official that demonstrates the petitioner "has been helpful, is being helpful, or is likely to be helpful" in the investigation or prosecution of the criminal activity. Further, either the head of the agency or a supervisor designated with the authority to issue certifications on behalf of the agency must sign the certification. The form must be signed by the designated law enforcement official within six months of submission of the interim U visa relief request.

Practice Note

Securing the prosecutorial certification when the client is in contact with the police or shortly after the investigation or prosecution in a timely manner makes it more likely to obtain the certification. While the statute does not require a specific prosecutorial result, many prosecutors are not amendable to reviewing or signing certifications while the prosecution is

ongoing, and they may wait until the prosecution is concluded. The police community is often able to be more flexible with requests. When seeking a certification, it is advisable to send a cover letter explaining the background of the U visa, its requirements, and why the client qualifies, as well as a copy of the statute and a blank U visa certification form. Many departments have specific personnel assigned to the task. There is also a U visa tool kit for law enforcement posted on USCIS's website that is helpful for law enforcement officers.

§ 34.3.6 Derivative Issues

The spouses, children, and, in the case of a child under age sixteen, the parents of a U visa nonimmigrant may obtain derivative status. This requires both a showing that the derivative will suffer extreme hardship if removed, and the submission of a U visa certification by a government official that the investigation would be harmed without the assistance of the derivative family member.

Practice Note

USCIS had a period of denying cases in which a derivative child (who never held interim relief) was over age twenty-one at the time the I-918A was filed on his or her behalf. Applications of those who were under age twenty-one (and who never held interim relief), but who aged out while the I-918A was pending were put on hold.

On December 12, 2012, USCIS issued long-awaited policy guidance related to two categories of aged-out U child derivatives: those who turned age twenty-one before petition approval, and those who turned age twenty-one after approval but before accruing the three years in U status necessary to qualify for adjustment of status. In such cases, the interim guidance should be consulted and can be found in the *Adjudicator Field Manual* (*AFM*) at Chapter 39.1. In sum, the guidance provides partial relief to derivatives who age out while their applications are pending and a more complete remedy for those who were granted U status but for an insufficient time to qualify for adjustment of status.

(a) ***Deferred Action for Age-Outs While Application Is Pending***

Until such time as the regulations are changed, the interim guidance provides that U derivatives who age out while the Form I-918A is pending will be considered for deferred action, which in turn provides eligibility for work authorization. To qualify for deferred action, USCIS must determine that the U derivative has submitted prima facie evidence of eligibility for derivative U status and does not have adverse factors, including an aggravated felony offense or circumstances that pose a threat to public safety or national security. Under the guidance, extensions of deferred action status will be reassessed each time an aged-out derivative applies for an extension of work authorization.

(b) ***Four-Year Period of Status for Derivatives Who Will Age Out After Approval***

The new guidance provides that USCIS will now be approving U status for the full four-year validity period if the derivative child is under age twenty-one at the time the application is approved, even if the derivative will turn age twenty-one during that four-year period. Derivative beneficiaries abroad will still have the responsibility of obtaining their visas and entry to the United States before turning age twenty-one.

(c) ***Extensions of Status for U Derivatives Who Were Not Granted Four Years of Status***

For U derivatives who were granted derivative status and aged out before this interim policy was issued (where they were granted a visa or status that expired when they turned age twenty-one, short of the time needed to qualify for adjustment of status), the guidance states that derivatives who aged out before accruing the requisite three years of continuous presence required for adjustment of status eligibility may apply for an extension of status by filing Form I-539. These late extension requests will be considered approvable because USCIS has determined that the failure to maintain derivative U nonimmigrant status in this situation was "due to extraordinary circumstances beyond the control of the derivative U nonimmigrant." An approved extension will date back to the derivative's twenty-first birthday, which is the date the authorized status expired. The derivative U nonimmigrant can then accrue the required three years of continuous residence in U status to qualify for adjustment of status. The guidance cautions that any further extension requests by the derivative would need to independently demonstrate that exceptional circumstances warrant another extension.

§ 34.3.7 Adjustment of Status

Under INA § 245(I), the attorney general has the discretion to grant adjustment of status to a U visa holder who has been physically present in the United States for three years as a U visa nonimmigrant, where such adjustment is justified on humanitarian grounds, to ensure family unity or when it is otherwise in the public interest.

According to the published regulations that took effect on January 12, 2009, a U visa holder seeking to apply for permanent residency under Section 245(m) must demonstrate that he or she

· was granted a U visa and currently holds U nonimmigrant status;

· has been continuously physically present in the United States for three years (from the date of admission as a U nonimmigrant);

· did not unreasonably refuse to assist in the investigation or prosecution of the underlying U visa crime after being granted

a U visa;
· is not inadmissible under INA § 212(a)(3)(E) (participants in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing); and
· meets a discretionary threshold, i.e., that adjustment of status is justified for humanitarian reasons, in the public interest, or to assure family unity.

Section 245(m) of the INA provides that adjustment of status is a discretionary benefit. Adjustment applicants therefore have the burden of showing that USCIS should exercise favorable discretion in favor of the applicant. Although U adjustment applicants are not required to establish that they are admissible under public health and most other grounds of admissibility, USCIS may take into account all factors, including any adverse factors, in determining whether a favorable exercise of discretion is appropriate. This may include, but is not limited to, health-related issues that may potentially have a negative impact on U.S. public health and safety. USCIS has decided that U adjustment applicants must submit a Form I-693, Report of Medical Examination and Vaccination Record, and warn that when determining whether a favorable exercise of discretion is appropriate, USCIS may consider an adjustment applicant's failure to provide a Form I-693 as a negative discretionary factor.

Unlike the T visa adjustment regulations, there is no limit to the number of U nonimmigrants who can adjust status in a fiscal year.

Practice Note

The U visa eligibility requirements for permanent resident status are different from the T, and may be more useful for persons with serious criminal histories or issues of good moral character. A careful examination of adjustment issues should be undertaken when determining which visa to apply for, depending on case factors affecting adjustment eligibility.

U waivers for good moral character are available through Section 101(f), as are I-192 waivers for applicants who entered without inspection or for other grounds of inadmissibility. The applicant must show that a waiver is in the " "public" or "national" interest by filing the waiver under INA § 212(d)(3) on Form I-192, Application for Advance Permission to Enter as Non-immigrant. Favorable discretion for persons with a history of violent or security-related grounds will only be granted in "extraordinary circumstances." 8 C.F.R. § 212.17.

Practice Note

The Vermont Service Center has dedicated hotlines for T and U visas: 802-527-4888, which returns your message within seventy-two hours. There are also e-mail addresses: hotlinefollowupI918I914.vsc@dhs.gov and hotlinefollowupI360.vsc@dhs.gov.

§ 34.4 CONCLUSION

The additional visas for victims of crimes and violence are important tools that can provide beneficial immigration relief, but these visas continue to have several implementation issues that practitioners should note carefully. Since its enactment, many delays have thwarted the success of TVPA, placing victims into prolonged periods of uncertainty. After the initial regulations for obtaining T visas were issued in 2002, two years after the passage of the TVPA, USCIS delayed another five years, until September 2007, before issuing regulations for the U visa. Adjustment regulations for T and U visa holders to become lawful permanent residents were finally issued in December 2008 and became effective on January 12, 2009, and the backlog of victims in the system began getting processed. Discretionary issues continue to be addressed, including delays in obtaining work authorizations, cooperation from law enforcement officials, processing times, and issues with derivative filings in the United States and abroad. Despite these difficulties, the remedies now play a vital role for immigrant victims of crime and upwards of 15,000 immigrant victims of crime annually can now secure these important immigration benefits.

EXHIBIT 34A—Comparison of T and U Nonimmigrant Visa Eligibility Requirements

Eligibility Requirements	T Non-Immigrant Visa96	U Non-Immigrant Visa97
Type of Abuse	Victim of severe **trafficking**.	Suffered substantial physical or mental abuse from certain criminal activity.
Where	Applicant must have been physically present in the United States or at a U.S. port of entry on account of such	Crime occurred in the United States or otherwise violated U.S. law.

	trafficking.	
Helpfulness with Investigation or Prosecution	Comply with reasonable request for assistance with the investigation of **trafficking** act.	Provide law enforcement certificate that victim has been, is likely to be or is being helpful to an investigation or prosecution of criminal activity.
Other	Applicant would suffer extreme hardship involving unusual and severe harm if removed.	Victim possesses information about the criminal activity.

INA § 101(a)(15)(T); 8 U.S.C. § 1101(a)(15)(T) (2008).
INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U) (2008).

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