Beyond the Criminal Justice System

SERVING IMMIGRANT SURVIVORS OF SEXUAL ASSAULT

This project was supported by Grant No. 15JOVW-21-GK-02205-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice.

ISSUED 2026

Serving Immigrant Survivors of Sexual Assault

I. INTRODUCTION

Immigrants are particularly vulnerable to sexual violence.[1] Immigrant survivors of sexual assault often encounter greater barriers and must overcome challenges (both actual and perceived) to access justice and obtain the civil remedies that can assist in their recovery. For example, fear and misinformation prevent many non-citizen survivors from applying for and receiving the immigration, safety, medical, mental health, housing, employment, and other benefits to which they may be entitled.[2] Concerns about whether and how law enforcement will respond can be a deterrent to reporting or accessing medical care and may prevent a survivor from seeking immigration remedies.

Undocumented survivors are especially vulnerable and are often isolated from the remedies that can help protect them.[3] Typically, undocumented

---

Victim Rights Law Center thanks Cecilia Lopez Santiesteban, Esq., and Betsy Byra, Esq., for their contributions to this chapter. Thanks, too, to Kathleen Devlin, Esq., Leslye Orloff, Esq., Kavitha Sreeharsha, Esq., Legal Momentum, Joanne Lin, and Nermeen Arestu for their contributions for their contributions to a previous version of this chapter.

Preparation of this material was supported by grant number 15JOVW-21-GK-02205-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, and conclusions expressed are those of the author(s) and do not necessarily represent the views of the U.S. Department of Justice.

[1] *See, e.g.*, Sze Eng Tan & Katie Kuschminder, *Migrant Experiences of Sexual And Gender-Based Violence: A Critical Interpretative Synthesis*,18 GLOBALIZATION AND HEALTH 68 (2022), https://doi.org/10.1186/s12992-022-00860-2.

[2] Some public services are available to individuals regardless of their immigration or citizenship status. Providers of these services should not inquire into a client's immigration status or require a social security number as a condition of service. Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation*,* 66 C.F.R. §§ 3613-3616 (2001). According to the United States Attorney General, available services include free emergency Medicaid and mental health, disability, or substance abuse treatment necessary to protect life or safety; free crisis and counseling services; free violence and abuse prevention/protection services; free emergency shelter and transitional housing assistance; victim compensation; and other services provided by non-profit charitable organizations. *Id.*

[3] *See, e.g.,* Leslye E. Orloff & Kathleen Sullivan, *Dynamics of Domestic Violence Experienced by Immigrant Victims*, *in* BREAKING BARRIERS: A COMPLETE GUIDE TO LEGAL RIGHTS AND RESOURCES FOR BATTERED IMMIGRANTS, at 1 (Legal Momentum ed., 2013), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/FAM-Manual-Full-BreakingBarriers07.13.pdf*;* Leslye E. Orloff *et al*., *With No Place To Turn: Improving Legal*

survivors fear retaliation, detention, and deportation, which makes them reluctant to access services they need. These survivors may not be aware of the immigration remedies specifically outlined under the law for victims of crime.

Survivors who are legally present in the United States, holding temporary immigration status, formally known as "nonimmigrant status," may need immigration assistance, too. Nonimmigrant status encompasses a variety of temporary immigration statuses, which generally do not lead to a path to lawful permanent status [4] Examples of nonimmigrants include but are not limited to tourists, students, exchange workers, or seasonal workers. Work, school, housing, and other aspects of a survivor's life are often disrupted by a sexual assault, and these disruptions may have a profound impact on a survivor's immigration status or path to adjustment. For example, a temporary worker assaulted by a supervisor may lose their employment-based visa if they leave their job. A survivor on a student visa who quits school following an assault may jeopardize their student-visa status. A survivor of domestic violence who has a pending family-petition may feel hesitant to seek protection out of fear of not obtaining lawful permanent residency or being deported. A rape survivor who wants to return to their home country to visit with family following the assault may jeopardize their ability to attain lawful permanent residency based upon their pending immigration application if they depart the United States without a travel document. Remaining in the United States may compromise their ability to heal and recover from the assault when they are deprived of the ability to immediately reunite with family, friends, or other members of their support network. However, if they travel abroad to obtain the care and support they immediately need, they may forfeit the immigration benefit they need and are eligible to receive in the United States, which in turn may jeopardize their long-term safety. Finally, any non- or limited-English speaking survivor may encounter barriers to accessing law enforcement or the courts due to

---

Advocacy For Battered Immigrant Women, 29 FAM. L.Q. 313, 315 (1995) hereinafter Orloff, *et al., With No Place To Turn*). *See generally* Leslye E. Orloff *et al*., EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (Legal Momentum ed., 2013) (hereinafter Orloff, *et al.,* EMPOWERING SURVIVORS), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/FAM-Man-Full-EmpoweringSurvivors07.13.pdf.

[4] *See* Immigration and Nationality Act § 101(a)(15), 8 U.S.C. § 1101(a)(15).

language barriers (*e.g.*, lack of interpreters, mono-lingual court forms), anti-immigrant sentiment, or other impediments.

There are several potential remedies immigrant survivors of sexual assault may pursue to gain legal status, this chapter will focus on four of those remedies: (1) VAWA Self-Petition, (2) U Visa; (3) T Visa; and (4) asylum. The Violence Against Women Act ("VAWA") created three of these four remedies discussed in detail in this chapter.

There are several other immigration remedies that may be available to survivors that will not be covered in this manual, including VAWA Cancellation of Removal[5], Battered Spouse Waivers, and Special Immigrant Juvenile Status. The purpose of this chapter to is to provide practitioners an introduction to working with immigrant survivors and to assist in screening for potential immigration options for survivors, not to be a comprehensive immigration reference. If you are not currently practicing immigration law and determine your client may need immigration assistance, the best course of action will likely be to refer your client to an experienced, trauma-informed immigration attorney. An experienced immigration practitioner can help a survivor make an informed decision and select the legal route most appropriate to their individual needs.

II. COMMON TERMS IN IMMIGRATION PRACTICE

Undocumented: An undocumented person refers to a non-United States citizen/foreign born individual who holds no lawful immigration status, such as someone with no visa or travel document. It can also refer to an

[5] Immigrant survivors of sexual assault perpetrated by their U.S. citizen spouse or lawful permanent resident spouse, former spouse, parent or an over 21-year-old child could also qualify to apply for VAWA Cancellation of Removal if they are in removal proceedings. *See* Moira F. Preda *et al.*, *Preparing the VAWA Self-Petition and Applying for Lawful Permanent Residence* (Aug. 2023)*, in* EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT, at 4 (Legal Momentum, ed., 2013), https://niwaplibrary.wcl.american.edu/wp-content/uploads/CH3.3-Preparing-the-VAWA-Self-Petition-and-Applying-for-Residence-BB.pdf (Aug. 2023); Rebecca Story, Cecilia Olavarria & Moira F. Preda*, VAWA Cancellation of Removal* (July 2013), *in* EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT, at 2 (Legal Momentum ed., 2013), https://niwaplibrary.wcl.american.edu/wp-content/uploads/IMM-Man-Ch9-VAWACancellationofRemoval.pdf.

individual who was in temporary immigration status, fell out of status, and remained in the United States with no lawful status.

Non-immigrant: A nonimmigrant is an individual who is seeking admission into the United States for a temporary period. Generally, nonimmigrant status does not lead to a path to residency or citizenship, with limited exceptions.

Lawful Permanent Resident: An immigration status held by individuals who have been granted "admission" as a permanent resident in the United States. Common terms used include "green card" and "LPR."

United States citizen (USC): A U.S. citizen is someone who was born in the U.S., was naturalized, or whose parents (and, in limited cases, grandparents) were U.S. citizens at the time of the child's birth or who naturalized before the child's 18th birthday.

Derivative: A derivative applicant is someone who is not immediately eligible for status, but can obtain that status through their relationship to a principal applicant. Individuals who qualify as derivatives vary by the type of status that is being sought.

USCIS: The United States Citizenship and Immigration Services is the agency under the Department of Homeland Security that adjudicates applications for immigration benefits.

EOIR: The Executive Office for Immigration Review is an agency under the Department of Justice. The department has administrative court judges that preside over removal proceedings of a noncitizen. The immigration judges determine removability and adjudicate applications for relief from removal.

ICE: The United States Immigration and Customs Enforcement is an agency within the Department of Homeland Security that enforces immigration laws. Individuals can be detained under the custody of this agency. This agency has the authority to physically remove an individual from the United States.

Deportation (removal) proceedings: Occurs when the Department of Homeland Security, Immigration and Customs Enforcements alleges that

an individual has violated immigration laws. The proceedings begin with the filing of a notice before the Executive Office for Immigration Review where an Immigration Judge will determine if the individual is removable from the United States and whether the individual is eligible for relief from removal.

VAWA: The Violence Against Woman Act was passed by Congress and created immigration remedies for noncitizen victims of domestic violence and crime.

U Visa: U Nonimmigrant Status, also known as the "U Visa," is a nonimmigrant status for victims of certain criminal activity.

T Visa: T Nonimmigrant Status, also known as the "T Visa," is a nonimmigrant status for certain victims of severe forms of trafficking in persons.

Child: For immigration purposes a child is defined as an unmarried person under 21 years of age. Note that there is another definition of "child" that is specifically applicable in the context of citizenship and naturalization, which will not be used in this chapter.

Adjustment of Status: Adjustment of status is the process that an individual may use to apply for Lawful Permanent Residence when they are present in the United States.

Inadmissibility: Grounds of inadmissibility outlined in the Immigration and Nationality Act, determine whether an individual will be granted admission as a non-immigrant, immigration, or lawful permanent resident. These grounds may be viewed as disqualifiers for benefits but there are waivers of inadmissibility for certain applications.

III. WORKING WITH NON-CITIZEN SURVIVORS

As noted above, for non-citizen survivors — especially undocumented survivors — fear of deportation, misconceptions about the U.S. legal system, exposure to anti-immigrant sentiments, and their experiences in the U.S., country of origin, or the countries in between may inhibit their willingness to access law enforcement or the courts. It is important to address at the outset a non-citizen survivor's potential fear of law enforcement authorities and the courts.

Non-governmental and governmental victim service agencies (including sexual assault crisis centers, district attorneys' victim assistance programs, local law enforcement agencies, or state or territorial courts) have no legal obligation under federal or state law to inquire about a sexual assault survivor's immigration status or to report an undocumented person's status to the Department of Homeland Security (DHS).[6] Nevertheless, some law enforcement agencies do inquire about – and report – a survivor's unlawful status.[7] Therefore, it is critically important to be familiar with the practices in your community. In addition, it is important for the survivor to know that if the law enforcement officer or agency does ask them about their immigration status, the survivor does not have to answer the question(s) posed and has a right to have an attorney present during questioning.

To have confidence and trust in your ability to provide help, a survivor needs to know you will keep their immigration status confidential, and that under no circumstances will you provide the Department of Homeland Security ("DHS") with the survivor's information without the survivor's express consent. When you explain confidentiality to your client, it is crucial to convey the importance of them telling you all of the relevant facts, including what their immigration status. An individual's legal status (or lack thereof) may direct the course of the case and have serious consequences

[6] Leslye E. Orloff, *Lifesaving Welfare Safety Net Access for Battered Immigrant Women and Children: Accomplishments and Next Steps*, 7 WM. & MARY J. WOMEN & L. 597, 626 (Spring 2001); Leslye E. Orloff, et al., *Battered Immigrant Women's Willingness to Call for Help and Police Response*, 13 UCLA WOMEN'S L.J. 43, 55 (2003) (hereinafter Orloff, et al., *Willingness to Call for Help*).

[7] Be aware that some community police departments have signed a Memorandum of Understanding with the Department of Homeland Security to implement Immigration and Nationality Act § 287(g) Agreements or programs such as Secure Communities. The § 287(g) program allows state and local law enforcement to enter into a partnership with U.S. Immigration and Customs Enforcement ("ICE"), whereby the local law enforcement agency has the power to enforce immigration laws in their jurisdiction. *See* 8 U.S.C.A. § 1357 (2006). If such an agreement exists in your jurisdiction, advise your client on the risks and benefits of reporting to that particular agency. ICE provides a list of jurisdictions that have entered into § 287(g) Agreements. *See* U.S. Immigration and Customs Enforcement, *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, https://www.ice.gov/identify-and-arrest/287g (last visited Sept. 30, 2024). Practitioners should note that depending on the administration's immigration priorities, ICE's priorities may also change.

for a survivor if your understanding is based on incomplete or inaccurate information.

A. Confidentiality and Privacy Considerations[8]

1. Protecting Confidentiality with Interpreters and Translators[9]

Language access to legal assistance is a fundamental component of representing survivors. Additionally, interpreters and translators are a necessary element of a language access plan. However, language access can add additional privacy considerations for survivors. In smaller or insular communities, the client may prefer to have interpretation or translation provided by someone outside of their immediate community. This can be arranged by using various telephone interpreters and internet translation services. Such arrangements are not a guarantee of privacy, however, because interpretation and translation services hire nationally and sometimes immigrant communities are closely connected across the U.S.

> [**Practice Tip**: Whenever possible, it is best practice to ask the name of the interpreter or translator ahead of time, conduct a conflict check and get the client's permission to use a particular interpreter or translator before hiring the professional. This avoids conflicts of interest and privacy breaches.]

Translate VAWA-compliant releases of information[10] and other frequently used documents to ensure all clients understand their right to confidentiality.[11]

---

[8] Much of the content for this section was developed in partnership with the National Immigrant Women's Advocacy Project. VRLC resources on protecting immigrants' privacy rights include "Immigrant Survivor Privacy – VAWA Protections" and "Immigration Privacy FAQs," both available in VRLC's Resource Library. *See Resource Library,* VICTIM RIGHTS LAW CENTER, https://victimrights.org/resource-library/ (last visited Oct. 2, 2024).

[9] VRLC's "Tips for Effective, Accurate, and Confidential Interpretation" available in VRLC's Resource Library. See *Id.*

[10] *See* Violence Against Women Act, 34 U.S.C. § 12291(b)(2) and 28 C.F.R. § 90.4.

[11] Translation Requirements for Vital Documents, Intake and Notice of LEP Assistance for DOJ and HHS Grantees Serving Immigrant Crime Victims, NIWAP https://niwaplibrary.wcl.american.edu/pubs/translation-vital-docs (April 2016).

Require interpreters and translators to sign a confidentiality agreement. Review the agreement with each interpreter and/or translator before introducing them to a client, providing documents, or otherwise contracting with them. Redact names and other identifying information on documents to be translated when permissible.

Use qualified professional interpreters and translators. Interpretation and translation are skills that require training, including training on the applicable confidentiality rules in professional codes of ethics, and go beyond conversing or writing in more than one language. Do not use bilingual staff to interpret or translate. Using staff as interpreters or translators could risk waiver of privilege, the staff person being called as a witness, and other problems.

2. "In the Process of Filing" Letters

For immigration remedies under VAWA, U Visa or T Visa provisions, the Department of Homeland Security (DHS) is required to keep all information about confidential.[12] DHS cannot release information about the existence of a case to any person who is not authorized to access that information for a legitimate law enforcement purpose.[13] Furthermore, if the perpetrator of the crime or any of their family members provides information to DHS about the crime victim, DHS cannot rely solely upon that information to make adverse decisions on the U Visa application and on admissibility or deportability for any case in which the survivor may be involved (*e.g.,* a removal action).[14] DHS is also precluded from relying on information provided solely by the

[12] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA"), Pub. L. No. 104-208, § 384, 110 Stat. 3009-652 (2005), 8 U.S.C. § 1367 (2006).

[13] In addition to disclosures to investigative agencies, DHS may provide portions of petitions for U nonimmigrant status to federal prosecutors in pending federal criminal proceedings. This obligation stems from constitutional requirements that pertain to the government's duty to disclose information, including exculpatory evidence or impeachment material, to defendants. *See* U.S. Const. amends. V, VI; *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Brady v. Maryland*, 373 U.S. 83, 87 (1963); 8 C.F.R § 214.14(e)(1)(ix).

[14] 8 U.S.C. § 1367(a).

abuser or their family members to initiate or take any part in an enforcement action against the survivor.[15]

VAWA confidentiality is most effective in protecting survivors when DHS officials are notified that the immigrant against whom they are conducting an enforcement action is a victim eligible for certain protections. Best practice is that, as soon as a client decides they will file an application for immigration relief under VAWA, T visa, U visa, continued presence, or abused spouse of A, E(3), G, or H work visa holder programs, provide the client with a letter stating that they are in the process of filing for the listed type of victim-based immigration case. This letter gives DHS formal notice that the immigrant is a victim and cuts off DHS' ability to rely on information the perpetrator provided to harm the victim.[16] Discuss the privacy implications of drafting the letter on firm/organization letterhead as the letterhead may indirectly reveal what type of abuse the client experienced. Discuss with the client how safety and privacy factor into what letters they take home and carry.[17]

3. Use of Safe Addresses

All VAWA confidentiality-protected case types (e.g., VAWA self-petitions, VAWA cancellation of removal, U visas, T visas, continued presence, employment authorization for abused visa holder spouses) allow applicants

---

[15] Memorandum from John P. Torres, Dir. of Office of Detention and Removal Operations and Forma, and Marcy M. Forman, Dir. of Office of Investigations, to Field Office Dirs. and Special Agents in Charge (Jan. 22, 2007), available at https://asistahelp.org/wp-content/uploads/2018/11/ICE-Memo-on-VAWA-Privacy-Provisions-January22-2007.pdf.

[16] *Instruction 002-02-001, Implementation of Section 1367 Information Provisions 10 (11.7.13),* https://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001.

[1717] For an in-depth discussion of VAWA Confidentiality considerations for immigrant sexual assault survivors, including strategies for protecting VAWA confidentiality and sample filings for civil cases, *see* Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation, and Violations of VAWA Confidentiality Protections, in* EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (NIWAP 2013), available at https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/FAM-Man-Full-EmpoweringSurvivors07.13.pdf.

to list a safe/alternate address[18] that DHS can use to communicate with them.

4. Remote Attendance

Although immigration enforcement at courthouses was curtailed in 2021,[19] attorneys may still want to request that their clients be allowed to participate in court proceedings remotely. Appearing remotely can be a safer option and eliminate the harm the client might otherwise experience when encountering perpetrators, et al., in-person on the way to, from, or at the courthouse. Discuss privacy protections that may apply with remote attendance such as using an inserted or blurred background to hide their location, obscuring the phone number for the call origination, removing identifying or personal objects, etc.

5. Discovery Requests[20]

Opposing parties may attempt to obtain information about a client's VAWA confidentiality-protected case through discovery in a family, civil, or criminal case. Case law nationally, DHS policies, and the federal VAWA confidentiality laws all confirm that the information about the existence of, actions taken in relation to, and evidence contained in federal VAWA confidentiality-protected case files are not discoverable in state civil, family, and criminal court cases. The only document that may be discoverable is a U visa certification or a T visa declaration signed by a government official involved in the case.[21] In criminal, family, and civil court cases, if immigrant clients are asked about decisions made in a VAWA confidentiality-protected immigration case, the client's attorney should not admit or deny

---

[18] *See* 8 U.S.C. § 1367(b)(7).

[19] *Civil Immigration Enforcement Actions in or near Courthouses* (April 27, 2021), NIWAP, https://niwaplibrary.wcl.american.edu/pubs/ice-and-cbp-courthouse-enforcement.

[20] Various free resources on VAWA Confidentiality are provided on NIWAP's website. *See* NIWAP, *VAWA Confidentiality Protections for Immigrant Crime Survivors,* (March 8, 2021), https://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools.

[21] NIWAP, *Training Tools for Prosecutors on the U Visa, VAWA and Criminal Court Discovery* (June 2023), https://niwaplibrary.wcl.american.edu/prosecutors-tools. NIWAP collaborates with AEquitas to provide technical assistance to prosecutors on criminal case discovery questions and criminal case strategy in cases involving immigrant survivors. NIWAP provides technical assistance on VAWA confidentiality to lawyers representing immigrant survivors in state court cases. To obtain either of these forms of technical assistance contact NIWAP.

the existence of such case, whether or not one has been filed, and should object citing VAWA confidentiality.[22]

6. Program Component Segregation

If a legal services program is part of a multi-service organization or collaboration serving immigrant survivors both in their legal needs and though other social support programs, segregating program components can help minimize opportunities for staff to inadvertently share confidential and privileged immigration information. Segregating information by program can also help to reduce the likelihood of conflicts of interest. Structure program databases so that there is a firewall between different program components. Be sure to implement VAWA confidentiality obligations through policies and practices that guarantee clients' confidentiality.

B. Language Barriers

To work with and represent a survivor, you must be able to communicate with them effectively. Additionally, if you receive federal funding, you may be legally obligated to have a federally compliant language access policy and ensure language access.[23] Some immigrant survivors may have limited proficiency in speaking, reading, and/or writing English. If you and your client are not both fluent in a common language, you will need to engage the services of an interpreter.[24] Even if your client speaks and/or writes functional English, or you speak and/or write functionally in their preferred language, consider securing interpreting services for all your critical engagements (such as the initial interview, the preparation of an affidavit, a protection order hearing, finalizing the immigration application, and preparing for and attending immigration interviews and court hearings).

---

[22] 8 U.S.C. § 1367.

[23] *Commonly Asked Questions*, LIMITED ENGLISH PROFICIENCY, https://www.lep.gov/commonly-asked-questions (last visited Oct. 2, 2024). For additional resources on developing a language access plan that complies with federal standards, see the Asian Pacific Institute on Gender-Based Violence's Language Access Hub, available at https://www.api-gbv.org/language-access-hub/ (last visited Oct. 15, 2024).

[24] *See* LIMITED ENGLISH PROFICIENCY: A FEDERAL INTERAGENCY WEBSITE, www.lep.gov (last visited Sept. 26, 2024).

1. Select a Qualified Interpreter or Translator

Before enlisting someone to interpret, ask the survivor questions that will help you to select an appropriate interpreter, such as information about their ethnic, cultural, and linguistic identity. Keep in mind that different ethnic groups may speak different dialects of the same language or may have ethnic or religious biases that could impact your client and the case. Language identification cards may help you determine what language(s) the survivor speaks.[25]

Select someone who is both qualified to interpret and/or translate[26] documents and is sensitive to your client's experience as a sexual assault survivor.[27] Some qualified interpreters may not be qualified translators and vice versa. Also, some translators may be skilled at translating from one language to another but not the reverse. It is imperative to use a qualified and skilled interpreter who is familiar and comfortable using the words and the terminology both you and the survivor will employ, including legal vocabulary and language around the sexual assault. Discomfort or lack of knowledge will impair their ability to effectively and accurately communicate information between you.

The nuances of conversations or documents are frequently vital to accurate communication and thus to a successful outcome for a survivor. Misinterpretation of the survivor's statement of the facts can lead to a variety of problems including faulty case strategy decisions, surprises in court, and inconsistencies between police reports and in-court testimony. These interpretation/translation issues can undermine client credibility with law enforcement, immigration authorities, prosecutors, or judges.

---

[25] *See Language Identification Flashcard,* CENSUS BUREAU, http://www.lep.gov/ISpeakCards2004.pdf. LIMITED ENGLISH PROFICIENCY (last visited Oct. 15, 2024), *supra* note 11.

[26] The term "interpret" refers to verbal communication. "Translate" refers to written documents. These two professional skills sets are specialized and require different and unique expertise. An excellent interpreter may not be an adequate translator and vice versa. Be sure to screen for both skill sets before employing an individual to assist in your client's case.

[27] *See* BRENDA K. UEKERT ET AL., NAT'L CTR FOR STATE COURTS, SERVING LIMITED ENGLISH PROFICIENT (LEP) BATTERED WOMEN: A NATIONAL SURVEY OF THE COURTS' CAPACITY TO PROVIDE PROTECTION ORDERS (2006), https://www.ojp.gov/pdffiles1/nij/grants/216072.pdf.

> **[PRACTICE TIP**: Refrain from using legalese with all clients. Be aware that some legal concepts may not exist in other cultures or have a direct translation into the other language. Explain in simple terms legal concepts that may not translate meaningfully. Adjust your language to the client's educational and literacy level to ensure understanding between you and your client.] [28]

Before proceeding with any specific interpreter or translator, be sure to conduct a conflict check to ensure that the interpreter is a neutral party without ties to the survivor or the perpetrator. This is particularly critical in small, insular communities.

2. Trauma Considerations

The survivors' experience and history may affect your selection of a qualified interpreter/translator. Ask other practitioners for their recommendations or experiences with trauma-informed interpreters. Before selecting your interpreter for client meetings or discussing details of your client's case, discuss with the client their comfort using an interpreter who is the same or a different sex from them. Once you've selected an interpreter, confirm that your client is sufficiently comfortable with the interpreter to speak honestly with you about the facts of the case and reiterate confidentiality.[29] You should also forewarn the interpreter if the conversation is likely to include graphic or difficult details.

> **[PRACTICE TIP:** Watch your client for signs of discomfort with the interpretation or lack or trauma informed practices on the part of the interpreter and terminate the session if they express concern or discomfort with the interpreter.]

---

[28] *See Tips: Working with Interpreters,* NATIONAL IMMIGRANT JUSTICE CENTER, https://immigrantjustice.org/for-attorneys/legal-resources/file/tips-working-interpreters (last visited Oct. 2, 2024).

[29] If your client's English skills are sufficient, it is best for you to ask the client this question in private.

3. Working with the Interpreter or Translator

While interpretation and translation can be a significant expense for a legal program, the collaboration, voice and transparency afforded through comprehensive language access for survivors is key to ensuring an ethical and trauma informed practice. Ensure the survivor has language access every time they reach out through your language access plan. Be you're your client understands the content of their court documents, any English language documents they have to sign, such as immigration-related documents, court pleadings, releases of information and other consent forms, and provide translations whenever possible.

Before beginning with the content of an interpreted conversation, give the survivor and the interpreter an opportunity to introduce to ensure they understand one another before proceeding. When using an interpreter, be sure to look at and speak directly to your client (and not to the interpreter). Speak at a moderate pace, particularly if you are using a simultaneous interpreter and pause periodically to allow the interpreter to speak without interrupting you. Remind your client to do the same. It is difficult for interpreters to accurately interpret long segments of dialogue at once. Check in with the interpreter during the conversation to make sure you do not need to slow down or break more often.

> **[PRACTICE TIP**: Beware of any back and forth between the interpreter and client when the interpreter is not interpreting. Remind the interpreter to interpret anything the client states and to tell you if they need to ask the client a question for clarification. If this is repeatedly occurring, it may be an indication that the interpreter may be answering questions directly or giving advice.]

C. Fear of Deportation

For a survivor with or without legal immigration status, fear of deportation is the principal barrier to seeking aid after an assault.[30] The survivor may remain afraid to report an assault or to receive assistance from a sexual assault crisis program, shelter, victim advocate, attorney, hospital or the

[30] Orloff & Sullivan, *supra* note 3. *See also* Orloff, *et al.,* EMPOWERING SURVIVORS, *supra* note 3.

police.[31] The prospect of their own deportation can make it difficult for a survivor without legal immigration status to consider seeking court protection and prosecution of their assailant. This is also often the case if the survivor has legal status but is married to or works for their visa sponsor (for example, if the sponsor is an employer or educational institution). It may lead to feelings of helplessness, causing a survivor to feel they have no legal right to protection from the assailant.[32]

> **[PRACTICE TIP**: If your communications with the survivor are protected by an attorney-client, victim-advocate, or other privilege, explain the scope of the privilege and how it helps to protect their privacy.[33]]

Despite — or because of — fear of deportation, a non-citizen survivor may elect not to cooperate with law enforcement or help in the prosecution of the assailant.[34] A survivor may also be afraid of what will happen to them or

---

[31] Mary Ann Dutton, Leslye E. Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO. J. ON POVERTY L. & POL'Y 245, 305 (2000); Orloff et al., *Willingness to Call for Help*, *supra* note 6 at 713.

[32] Chris Hogeland & Karen Rosen, COAL. FOR IMMIGRANT & REFUGEE RIGHTS & SERVS, *Dreams Lost, Dreams Found: Undocumented Women in the Land of Opportunity* 16 (Winter, 1991), https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Rsch-DreamsLostDreamsFound.pdf.

[33] If your client decides to pursue U Visa, T Visa or VAWA immigration relief, inform them that information about the existence of any U- or T Visa or VAWA case and anything filed in that case is protected by federal VAWA confidentiality. 8 U.S.C. § 1367 (2006). For a more thorough discussion regarding VAWA's confidentiality requirements *see* Leslye E. Orloff, *VAWA Confidentiality: History, Purpose, DHS Implementation, and Violations of VAWA Confidentiality Protections, in* EMPOWERING SURVIVORS: LEGAL RIGHTS OF IMMIGRANT VICTIMS OF SEXUAL ASSAULT (NIWAP 2013), available at https://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/pdf/FAM-Man-Full-EmpoweringSurvivors07.13.pdf.

[34] The fear of deportation was recognized by Congress which led them to create avenues of protection for survivors of crime.

their family (either in the U.S. or overseas) if the assailant is deported and retaliates.[35]

Another concern for a survivor without legal status is how their community will respond if they report an assault and the assailant is deported. A survivor may depend on the emotional, financial, and practical support their community provides, and their support system may erode if they report the assault or cooperate with law enforcement. A survivor may blame themselves or be blamed by others. If the deported person provided financial support to family members in the U.S. or abroad, the blame may be exacerbated.

Because of this potential alienation from their community and support system, it is vitally important to connect the survivor with culturally competent services and support. When working with non-citizen survivors, it is also helpful to explain how the U.S. criminal justice and immigration systems operate. If the survivor understands that it is the government's – and not their – decision on whether an assailant is arrested, prosecuted, or deported, the survivor is better able to make informed choices regarding how to proceed.

D. Misconceptions About the Legal System[36]

A survivor who holds no lawful status in the United States may perceive the United States legal system as an institution that protects the assailant and not the survivor. This is especially likely to be true if the assailant is a United States citizen or has legal immigration status, and the survivor holds nonimmigrant status or is undocumented.

If a survivor believes that the government might treat them unjustly, it may be difficult for them to trust law enforcement, prosecutors, or the court system. Survivors from countries in which the outcome of a legal

[35] If the assailant is not a U.S. citizen, a sexual assault conviction can constitute a deportable offense that may lead to his deportation. If the perpetrator is in custody, the jail may turn the perpetrator over to the Department of Homeland Security ("DHS") for deportation, either in lieu of prosecution, after a conviction, or after the perpetrator serves his sentence. DHS has a victim notification program that provides information to individuals who register with the program about the release or removal of the perpetrator.

[36] *See generally* Orloff & Sullivan, *supra* note 3.

proceeding is determined by a party's social status, money or political connections or where sexual assault offenses go unpunished due to institutional gender bias. Moreover, in the survivor's home country a woman's testimony may not be valid evidence or carry the same weight as a man's.[37] As a result, a female sexual assault survivor may believe that their lack of money, social status, political connections, or other sources of power – either alone or in combination with their undocumented immigration status - will prevent them from being treated justly by our criminal or civil legal system.[38] Similarly, if a survivor identifies as lesbian, gay, bisexual, transgender, or queer and they experienced harm, harassment or a lack of protection from law enforcement in their home country, they may be more hesitant to trust the United States justice system.

If the survivor has concerns based on their experiences with judicial bias where they lived previously, respect their fears and concerns but also explain the benefits of obtaining protection from the court. Be careful not to promise them how their case will be resolved, as a positive outcome cannot be guaranteed, but explain how the court system operates so that they can make informed decisions. Providing your client with a full picture of the legal system will enhance the credibility of any testimony they provide because it will allay their fears; it may also help boost their confidence and willingness to testify.

E. Determining A Survivor's Immigration Status

A survivor may not always know their precise immigration status. [39] In determining a survivor's immigration status, it can help to look at the following documents (if the survivor has them): passport; Employment

[37] U.S. Comm'n on Civil Rights Racial & Ethnic Tensions in Am. Cmtys, Poverty, Inequality and Discrimination — A Report of the United States Commission on Civil Rights 75 (January 1993) (referencing Leslye E. Orloff's testimony before the Round Table Forum on Hispanics in the Courts, November 2, 1991).

[38] Non-citizen survivors who come from countries in which a woman's testimony is not considered valid evidence may have a very hard time believing that their testimony is valid evidence in U.S. Courts and that a U.S. judge will believe their testimony as opposed to the testimony of the assailant.

[39] If your client has a parent or grandparent who is or was a U.S. citizen, speak with an immigration attorney to determine if your client is also a U.S. citizen.

Authorization Document (EAD card); I-94 arrival/departure record; lawful permanent residency card (often referred to as a "green card"); birth certificate; and any U.S. visa or stamps in their passport. If the survivor has a valid green card, it should and must be carried with them. If the client does not have such documents, it is recommended that you file a Freedom of Information Act (FOIA) request with an agency within DHS.

> [**PRACTICE TIP:** It is generally not recommended for an undocumented individual to carry their passport/identification document card from their country of origin due to the risks of being stopped by immigration officials. An identification document from the survivor's country of origin can be used as proof of alienage by immigration officials. [40] Some states permit undocumented individuals to obtain a state driver's license if the applicant provides certain documentation[41]. Check your local statutes if a state identification is permitted for undocumented immigrants in your state.]

F. Legal Protections for Survivors

Over time Congress has created several protections for survivors that will be covered in this chapter, including VAWA self-petitions, U nonimmigrant status, and T nonimmigrant status. Congress passed the Violence Against Women Act of 2000 and included immigration protections based on findings that "[d]omestic battery problems can be terribly exacerbated in marriages where on spouse is not a citizen, and the non-citizens legal status depends on their marriage to the abuser."[42] Among other immigration protections, VAWA added a protection for a survivor married to an abusive U.S. citizen or legal permanent resident spouse to self-petition

---

[40] In some states, it is a minor crime not to provide your name when asked by a police officer. While punishment for these crimes is minor, an individual still could be arrested for not providing their name. Remember that providing your name has risks, and that your name can be used to start a deportation process.

[41] New York and California, amongst other states, are states that permit residents of the state to obtain a driver's license regardless of lawful immigration status. *See e.g.*, States (and DC) That Allow Undocumented Immigrants to Obtain Driver's License, PROCON (Nov 14, 2022), https://immigration.procon.org/states-and-dc-that-allow-drivers-licenses-for-people-in-the-country-illegally/.

[42] Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

to obtain lawful permanent residence without the involvement of that spouse. The Violence Against Women Act of 2000 also created the protection of U nonimmigrant status (commonly known as the "U visa") for immigrant victims of criminal activity.[43] This benefit offers temporary lawful status to victims who have suffered substantial physical or mental abuse as a result of criminal activity perpetrated against them.[44] The purpose of U Visa legislation is to:

> create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking, and other crimes … committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.[45]

In recognition of the growing and dire problem of trafficking, when Congress enacted the Victims of Trafficking and Violence Protection Act (VTVPA), it created T nonimmigrant status (commonly referred to as the "T Visa") for certain trafficking survivors and their family members.[46] The T Visa serves two purposes: (1) it assists U.S. law enforcement in identifying, apprehending and prosecuting traffickers; and (2) it provides critical immigration protection to trafficking survivors. For other survivors that experienced persecution in their home country, they may be eligible for other immigration remedies under Asylum law or the Convention Against Torture.

> [**PRACTICE TIP:** In April 2024, USCIS updated the fee schedule for many of the immigration forms used by survivors. Most of the form forms associated with VAWA, U Visa, and T Visa now have no fees. However, USCIS periodically updates their fee schedules, and you should always check the USCIS

[43] Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

[44] Immigration and Naturalization Act § 101(a)(15)(U)(i), 8 U.S.C. § 1101(a)(15)(U)(i) (West 2010).

[45] The Violence Against Women Act of 2000 Section by Section Summary, 146 Cong. Rec. S10, 195.

[46] 8 U.S.C.A. § 1101(a)(15)(T) (West 2010).

website for the most up-to-date fee schedules. The current fee schedule is available at https://www.uscis.gov/g-1055.]

G. Remedies for Derivatives to Preserve Family Unity

Preserving and restoring family unity can be an essential part of healing for a survivor because it maintains natural support networks. Most immigration remedies discussed in this manual have provisions for survivors to include certain family members in their immigration process. In immigration practice, family members that are allowed to file a corresponding application with the survivor's immigration application are called derivatives. Derivative categories might include spouses, children, stepchildren, parents, and siblings under certain circumstances. Eligible derivative family members vary from one remedy to another. Which family members are eligible to be included, when their application should be filed, and whether they are eligible to adjust to permanent residence depends on the type of remedy and the specific facts of the case. If a client has questions about family member eligibility, those questions are best handled by an experienced immigration practitioner.

> **[PRACTICE TIP:** Even if you are not assisting the client with their immigration process, you should let the survivor know that immigration status may be available for some immediate family members both in the U.S. and abroad if they apply for their own immigration status. Sometimes survivors will not disclose family members to protect them. This information will allow them to make a more informed decision about their options. This knowledge will also help them to preserve evidence they may need for derivative applications.]

IV. VAWA SELF-PETITION

Immigrant survivors who have been the survivor or extreme cruelty or battery by their USC or LPR spouse or parent or USC child may be eligible to obtain lawful permanent residence by self-petitioning. The self-petition under VAWA was created recognizing that abusers exploit the vulnerability of a survivor's immigration status, making them believe that reporting the abuse or ending the relationship with the abusive family member petitioning for their immigration status would cause them to be deported. It was also

addresses the issue of abusers holding the family petition over the survivor as a tool of power and control, removing the role of the abusive individual in the process.

A. Benefits of VAWA Self-Petition

Through a VAWA self-petition, a victim of a U.S. citizen abuser may be eligible to immediately apply and be approved for permanent residence with their VAWA self-petition. In situations where the abuser only has, the victim may self-petition and receive deferred action that lasts one year, work authorization and some protection from deportation. The work authorization is renewable until they are eligible to file for permanent residence. The survivor is also eligible to include their eligible family members in their self-petition. This route is safe and confidential, and per statute, the filing of a petition and its contents will remain confidential within the agency. If successful, the petitioner and their qualifying family members will obtain lawful permanent residence.

VAWA promotes family unity by allowing certain self-petitioners to include their derivatives. A self-petitioning spouse can include their unmarried children under 21 years old.[47] A self-petitioning child can include their unmarried children under 21 years old. A derivative must prove that they meet the definition of a qualifying family member at the time of filing. If any derivative is close to turning 21 years old (aging out) then they should be included in the petition before they age out. It is important to ask your client for the ages of all of their children, even if they are not residing in the United States.

B. Eligibility for VAWA Self-Petition

An applicant is eligible for VAWA if: the petitioner is the abused spouse of a USC or LPR, an abused parent of an over 21-year-old USC child, an abused child of a USC or LPR, or a non-abused spouse of USC or LPR whose child was abused by a USC or LPR; the petitioner was the victim of battery or extreme cruelty; the petitioner resided with the abuser; and for

[47] 8 C.F.R. § 204.2(c)(4).

self-petitioning spouses, the marriage was entered in good faith.[48] Additionally, the petitioner must show that they have good moral character.

1. Good Faith Marriage

Self-petitioning spouses need to show that they are, or were, married[49] to their abusers and that they entered the marriage in good faith, meaning not solely for immigration benefits. The petitioner ultimately must show that the couple intended to make a life together and present themselves as a married couple to the world.[50] This can be proven in many ways. Some examples include birth certificates of children in common, joint lease agreements, joint bank statements, joint car lease, health and life insurance, police or medical reports providing information about the relationship, and sworn statements of friends and family.[51]

USCIS recognizes that is difficult for survivors to obtain specific documents when there is abuse and control in the relationship. USCIS thus asks officers to be aware of and consider these issues in their evaluation of the evidence.[52] Further, practitioners should think creatively when obtaining access to documents is challenging for the petitioner. For example, if the survivor can get letters from neighbors that can attest that the couple has been residing together and the neighbor knows them to be a married couple. Another example could be letters from a place of worship/prayer that can attest that the couple is/was married. Obtaining immigration records where the abuser had filed a petition for the survivor in the past can also be helpful to use to meet this requirement.

---

[48] 8 C.F.R. § 204.2(c)(1).

[49] Note that if the survivor believed that they were married to the abuser, but the marriage was not legitimized "solely due to the abusive U.S. citizen or LPR's bigamy or polygamy," the applicant can still meet this requirement. INA § 204(a)(1)(A)(iii)(II)(aa)(BB); 3 USCIS-PM D.1(B)(2).

[50] 8 C.F.R. § 204.2(c)(1)(i)(H).

[51] 8 C.F.R. § 204.2(c)(2(vii).

[52] 3 USCIS-PM D.5(B)(2).

2. Joint Residence

Self-petitioning spouses must also prove that they reside or resided with the abuser in the past.[53] What is not required is for the survivor to continue residing with the abuser during the time the petition is pending, when the petition is filed, or when the abuse occurred.[54] There is also no specific length of time that the couple resided together. To prove this requirement, the petitioner can use various forms of evidence. Some examples include: a lease agreement or mortgage with the name of the survivor and the USC or LPR relative, utility bills with the names of the survivor and abuser, medical records, income tax returns with both the survivor and abuser listed, and any other credible evidence.[55]

3. Battery or Extreme Cruelty

The petitioner must have "been battered by, or ha[ve] been the subject of extreme cruelty perpetrated by the citizen or lawful permanent resident during the marriage."[56] USCIS uses the general definition that includes "any offensive touching or use of force on a person without the person's consent", [57] which encompasses sexual assault Even if the survivor never suffered physical acts of violence, they may still meet this requirement if they can show they experienced extreme cruelty. "[E]xtreme cruelty is a non-physical act of violence or threat of violence demonstrating a pattern or intent on the part of the U.S. citizen or LPR to attain compliance from or control over the self-petitioner."[58]

The type of evidence a survivor uses to prove this requirement can vary. Some common examples include police reports, protection orders, court records, medical records, reports from a phycologist or social worker, records from a domestic violence shelter, an affidavit, or any other credible evidence. If your client hands you court records, a police report, or

---

[53] 8 C.F.R. § 204.2(c)(1)(i)(D).

[54] 8 C.F.R. § 204.2(c)(1)(v). However, it is required for a petitioning child to have resided with the abusive parent when the abuse occurred.

[55] 8 C.F.R. § 204.2(c)(2)(iii).

[56] 8 C.F.R. § 204.2(c)(1)(i)(D).

[57] 3 USCIS-PM D.2(E)(1) (citing Merriam-Webster's law definition of "battery").

[58] 3 USCIS-PM D.2(E)(1) (citing *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003)).

psychological reports, read them thoroughly and make sure there is no information included that may jeopardize your client. While these reports can serve as evidence to meet a requirement, you want to ensure that it does not contain information that will raise inadmissibility or discretionary issues.

4. Good Moral Character

A self-petitioner must also show that they are a person of good moral character.[59] A USCIS officer will evaluate the "conduct" of a petitioner on a case-by-case basis using their own exercise of discretion. Prior law enforcement contacts will be relevant to this review. You should review all arrests, charges, and convictions thoroughly and determine if there are any admissibility concerns.

C. Filing and Adjudication of the VAWA Self-Petition

A self-petitioner can submit their petition while residing within the United States or abroad. The petitioner must submit Form I-360 (VAWA Petition) with accompanying evidence to prove each requirement.[60] If the self-petitioner is an immediate relative – meaning that they are the spouse, parent, or unmarried and under 21 children of a USC, then they can file the adjustment of status application (Form I-485) concurrently with the VAWA Petition (I-360). If the petitioner is within the "preference category" – meaning that they are the unmarried child or spouse of an LPR, a married child of a USC, or children over the age of 21 of a USC,[61] they can only file the VAWA petition, obtain a priority date, and once that priority date is current, file the application for adjustment of status (I-485).

After the petition is submitted, USCIS will conduct prima facie ("first look") review of the petition. If the petitioner and derivatives can establish a prima facie case for the immigration classification, they may be eligible for certain

[59] 8 C.F.R. § 204.2(c)(1)(i)(F).

[60] Confirm that you are submitting the correct edition of Form I-360 and always refer to the instructions outlines on the USCIS page, https://www.uscis.gov/i-360 (last visited Oct. 15, 2024)

[61] Note that preference category also includes siblings of USC but this relationship is not relevant to VAWA.

public benefits.[62] Note that this determination will only be made for petitioners residing in the United States since individuals outside the United States are not eligible for public benefits. The standard of proof the petitioner must meet is establishing eligibility by a preponderance of the evidence, but when adjudicating the VAWA petition, USCIS must consider "any credible evidence." If the VAWA petition gets approved, the petitioner will be granted deferred action and be eligible for work authorization.

V. U NONIMMIGRANT STATUS FOR SURVIVORS OF QUALIFYING CRIMINAL ACTIVTY

U Nonimmigrant status was created in recognition of the barriers immigrant survivors experience that often prevent them from reporting criminal activity to the police. The U Visa was enacted to encourage immigrant survivors of qualifying crimes, including domestic and sexual assault, to come forward and cooperate with law enforcement efforts by providing them a path to work authorization, legal status, and for some, legal permanent residency. Additionally, in recognition of the immigration violations that victims may have accrued that would make them inadmissible as an immigrant to the U.S., congress included a very broad inadmissibility waiver, making the U Visa a possible route to status for many survivors that would be ineligible for many other immigration remedies.

A. Benefits of U Nonimmigrant Status

The U Visa is a four-year non-immigrant status, which means that it is a temporary status and not intended as permanent status to remain in the U.S. However, Congress also created a provision allowing certain U Visa holders[63] to apply for Lawful Permanent Resident (LPR or "green card" holder) status, thereby allowing an immigrant to remain permanently in the United States and eventually apply for citizenship. This U Visa creates an

[62] *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. 104-193, 110 Stat. 2105 (August 22, 1996).

[63] In order to be eligible for lawful permanent residence, a U Visa holder must prove that they did not unreasonably refuse to cooperate in the investigation or prosecution of criminal activity and that they have been physically present for three years since the issuance of their U Visa and that their presence is justified "on humanitarian grounds, to ensure family unity, or is in the public interest." Immigration and Naturalization Act § 245(m); 8 U.S.C.A. § 1255(m) (West 2011).

option for immigrant crime victims who may not have access to any other form of immigration relief.

One of the U Visa's critical benefits includes allowing those receiving U Visas to lawfully accept employment in the United States.[64] A U Visa holder is automatically granted an employment authorization document that allows them to accept employment. This ensures immigrant survivors the ability to provide for themselves and safely remain in the United States after being victimized.

The U Visa promotes family unity by permitting applicants to include their immediate family members in their applications and help their family members derive U nonimmigrant status.[65] This prevents families from being separated while the crime victim participates in the criminal investigation process, and allows for additional familial support. U Visa applicants may also obtain U Visas for family members abroad. U Visas also provide a safety precaution as many immigrant crime survivors face threats to their family members in their home country if they cooperate with law enforcement officials in the United States.

B. Eligibility for U Nonimmigrant Status

In order to be eligible for U nonimmigrant status, the immigrant survivor must:

- Have suffered substantial physical or mental abuse as a result of having been a victim of the one or more of the criminal activities listed under INA § 101(a)(15)(U)(iii);[66]
- Possess information concerning the criminal activity;[67]
- Obtain a certification from a law enforcement official, prosecutor, judge, immigration official, or other federal, state, or local authority that they are being, have been, or are likely to be

[64] 8 C.F.R. § 214.14(c)(7).

[65] 8 C.F.R §§ 214.14(a)(10).

[66] Immigration and Naturalization Act § 101(a)(15)(U)(i)(I), 8 U.S.C. § 1101(a)(15)(U)(i)(I) (2006).

[67] Immigration and Naturalization Act § 101(a)(15)(U)(i)(II).

helpful to the detection, investigation, or prosecution of one of the criminal activities;[68] and
- The criminal activity violated the laws of or occurred in the United States.[69]

Family members of victims who receive U-1 nonimmigrant status are also eligible to receive U- nonimmigrant status if they fall into one of the following categories:[70]

- U-2—Spouse of U-1 if they are legally married to the U-1 prior to the U-1 filing their application. Divorce from the U-1 will result in the U-2 losing their ability to qualify as a derivative.
- U-3—Child of the principal petitioner if they unmarried and under 21 years of age prior to the U-1 filing their application.
    - Children who are born after the application is approved are also considered qualifying family members so long as an additional application is filed on their behalf.[71] Importantly, the age of an unmarried child of a principal applicant will freeze after the filing of the U Visa petition.
- U-4—Parent of U-1 petitioner if the U-1 petitioner is under 21 when they file their application for U status. [72]
- U-5—Unmarried sibling who is under 18 years old if the U-1 petitioner is under 21 when they file their own application for U nonimmigrant status. [73]

A U Visa applicant may include petitions for their family members with their U Visa application, or they may submit an application for them at a later

[68] Immigration and Naturalization Act § 101(a)(15)(U)(i)(III).

[69] Immigration and Naturalization Act § 101(a)(15)(U)(i)(IV).

[70] Immigration and Naturalization Act § 101(a)(15)(U)(ii).

[71] 8 C.F.R. § 214.14(f)(4)(i).

[72] *Id*.

[73] *Id*.

time before the expiration of their U-1 nonimmigrant status.[74] Again, there is no cap or limit on the number of U Visas that can be issued to the spouses, children, parents, or siblings of U Visa recipients.[75]

1. Substantial Physical or Mental Abuse

In order to be eligible for U nonimmigrant status, an applicant must have suffered substantial physical or mental abuse as a result of being a victim of the criminal activity.[76] In determining whether the abuse is s*ubstantial*, DHS will consider:

- The nature of the injury;
- The severity of the perpetrator's conduct;
- The severity of the harm suffered;
- The duration of the infliction of harm; and
- Permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.[77]

DHS will take into account any or all of these factors. No single factor is required, nor does the existence of any single factor automatically establish that the abuse was substantial.[78] It is important to note that a series of actions taken together can cumulatively establish substantial abuse, even where no single act would alone rise to that level.[79] Moreover, DHS has discretion to consider the aggravation of pre-existing conditions as well as the severity of the perpetrator's conduct—even if the actual impact on the

---

[74] A U Visa recipient who receives lawful permanent residency may also apply for a qualifying family member who has never held U Visa status. Immigration and Naturalization Act § 245(m)(3). The standard is more difficult at this stage, however, as the qualifying family members must prove that the principal or they will suffer extreme hardship. DHS may allow the qualifying family member to file for and receive lawful permanent residency in the United States if the qualifying family member is in the U.S. If the qualifying family member is abroad, she or he may receive an immigrant visa allowing them to lawfully enter the United States. Immigration and Naturalization Act § 245(m)(3).

[75] Immigration and Naturalization Act § 214(p)(2).

[76] Immigration and Naturalization Act § 101(a)(15)(U)(i)(I).

[77] 8 C.F.R. § 214.14(b)(1).

[78] *Id*.

[79] *Id*.

survivor may have been less than intended by the perpetrator—based on the applicant's individual experience.[80] Advocates and caseworkers can play critical roles in assisting survivors to collect documentation to support this requirement.

2. Victim of an Enumerated Criminal Activity

Congress created an extensive list of criminal activities that qualify under the U Visa.[81] This enumerated list provides federal, state, and local officials with guidelines on the types of federal, state, or local crimes for which survivors should be provided certifications. The crimes listed are meant as categories of crimes and are broadly described in the statute in order to capture the diversity of state and federal criminal violations with immigrant survivors. As such, this list is not an exclusive list and the statute allows USCIS to consider substantially similar criminal activity to fall within the activity covered, including attempt, conspiracy, and solicitation.[82]

> **[PRACTICE TIP**: Be sure to work with the certifying official closely when choosing which category or categories the crime might fall into, especially if the crime investigated and/or prosecuted is not listed as a "qualifying crime." For instance, if the client was a victim of misdemeanor assault and battery by an intimate partner, the certifier can categorize it under "domestic violence." Or, if the crime involved a non-intimate partner and the victim was sexually assaulted, it can be categorized under "abusive sexual contact." Use the facts of the case to advocate to the certifier that the criminal act committed is a qualifying criminal activity.]

---

[80] *Id.*; New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (Sept. 17, 2007).

[81] 8 C.F.R. § 214.14(a)(9). The list includes: rape, torture, trafficking, incest, domestic violence, sexual assault, abusive sexual contact, prostitution, sexual exploitation, female genital mutilation, being held hostage, peonage, involuntary servitude, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, and the slave trade.

[82] *Id. See also* Immigration and Naturalization Act § 101(a)(15)(U)(iii), 8 U.S.C. § 1101(a)(15)(U)(iii) (2006).

The regulations incorporate a broad framework for how a survivor can satisfy the requirement that they must be a victim of an enumerated criminal activity. In order to establish eligibility, the rule generally requires an applicant to show that they were directly and proximately harmed by qualifying criminal activity.[83] In the preamble of the regulations, USCIS indicated that some bystander witnesses may be also considered direct victims if they suffered unusually direct injury as victims.[84] The example given is of a pregnant woman who witnesses a violent crime and becomes so frightened that they suffer a miscarriage.[85] Furthermore, the rule also sets out two specific categories in which indirect victims may establish eligibility. First, when the primary victim dies as a result of murder or manslaughter, or is incompetent or incapacitated, their spouse and children (under 21) qualify as direct victims; if the direct victim is under 21, the victim's parents and unmarried siblings under 18 may also be considered indirect victims.[86] Second, an individual will be considered a qualifying victim of perjury, obstruction of justice, or witness tampering if the perpetrator committed the offense in an effort to avoid investigation, arrest or prosecution, or to further the perpetrator's abuse and control over the applicant through manipulation of the legal system.[87]

Survivors must show that they are not also culpable of the same criminal activity.[88] If a U Visa applicant has a criminal conviction, the applicant will not be prevented from qualifying for a U Visa so long as: (1) the conviction is unrelated to the qualifying criminal activity that caused the victimization; (2) the victim additionally suffered; and (3) the victim was willing to help law enforcement in the investigation and prosecution of one or more of the

[83] 8 C.F.R. § 214.14(a)(14).

[84] *See* 72 Fed. Reg. at 53016-53017.

[85] *Id*.

[86] 8 C.F.R. § 214.14(a)(14)(i).

[87] 8 C.F.R. § 214.14(a)(14)(ii).

[88] 8 C.F.R. § 214.14(a)(14)(iii).

listed criminal activities.[89] If the victim was a culpable participant in the underlying criminal activity upon which the U application is based, they may not qualify as a victim.

3. Possess Information

The U Visa was enacted to encourage survivors of criminal activity to feel safe in reporting crimes against them without adverse immigration consequences. A U Visa applicant must prove that they possess information about the criminal activity.[90] Their knowledge of the criminal activity against them is a critical component of the U Visa application. Applicants who were under 16 when the criminal activity occurred, or who otherwise lack capacity or competence do not have to prove that they possess information if a parent, guardian, or next friend[91] possesses that information.[92]

4. Certification of Helpfulness

The requirement that an applicant "has been helpful, is being helpful or is likely to be helpful"[93] includes past, present, and future helpfulness. Congress adopted this approach to ensure that certifications were not limited only to cases in which prosecutions were underway or completed. A key congressional goal of the U Visa legislation was to encourage survivors to come forward to report crimes and to secure victims' assistance in crime detection, investigation, and prosecution, not just in successful prosecutions. For this reason, survivors were granted the opportunity to access U Visa protection early in the criminal justice process, and eligibility is not contingent upon a case going to trial or upon obtaining a conviction.

---

[89] Although unrelated criminal activity on the part of the applicant will not prevent them from qualifying as a victim for U Visa purposes, that criminal activity may make them inadmissible to the United States. There are waivers available to U Visa applicants for some grounds of inadmissibility. Please see the section later in this chapter discussing inadmissibility and waivers.

[90] Immigration and Naturalization Act § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II) (2006).

[91] The *next friend* is a person who acts in a legal proceeding on behalf of an individual who is under the age of 16 or incompetent or incapacitated. 8 C.F.R. § 214.14(a)(7).

[92] 8 C.F.R. § 214.14(b)(2).

[93] Immigration and Naturalization Act § 101(a)(15)(U)(i)(III).

The criminal justice process in each case will be different, and different levels of assistance may be required from each survivor.

It is critical for a survivor who is reporting criminal activity to understand that although they can obtain U Visa status based on reporting criminal activity, their helpfulness does not end with the initial report of the criminal activity. Though it is not required that the case be investigated, carried through and prosecuted, the applicant must continue to cooperate as needed throughout the duration of the U Visa status.[94] If the survivor is perceived not to be helpful, the law enforcement agent may contact DHS with this information and the U Visa may be revoked. Lack of willingness to cooperate in the investigation of a criminal activity can also impact a U Visa recipients' ability to adjust status.[95]

DHS requires all U Visa applicants to provide certification from a state, local, or federal agency (Form I-918 Supplement B) in order to grant U Visa status.[96] The form requires the law enforcement official, judge, or other authorized state, local, or federal employee to certify that the survivor is a victim of one or more qualifying criminal activities, that the applicant possesses information about the criminal activity, and that the applicant has been, is being, or is likely to be helpful in detection, investigation or prosecution.[97]

Though the certification is a mandatory element of U Visa eligibility, many different agencies qualify as certifying agencies and may sign the certification form. To qualify, an agency must have responsibility for the detection, investigation or prosecution of qualifying criminal activity.[98] The certification must be signed by the head of the agency or by any one of a

[94] 8 C.F.R. § 214.14(b)(3).

[95] Permanent residence for U Visa holders is discussed in Section V.E.

[96] 8 C.F.R. § 214.14(c)(2)(i).

[97] 8 C.F.R. § 214.14(c)(2)(i).

[98] 8 C.F.R. § 214.14(a)(2).

number of persons with supervisory authority who have been designated by the agency head to be U Visa certifiers.[99]

Although the U Visa regulations have been out since 2000, many state and local law enforcement agencies have not yet implemented U Visa certification practice. While the U Visa regulations encourage certifying agencies to issue U Visa certification protocols to facilitate immigrant access to U Visas, protocols are not required for a certifying agency to sign U Visa certifications. Practitioners should also note that agencies are not required to sign the certification even if the survivor has been helpful with the investigation. Applicants may encounter law enforcement or other government agencies that lack the understanding of the U Visa, that have never done a U Visa certification, and that have no protocols addressing how to respond to certification requests.

> **[PRACTICE TIP**: It is sometimes necessary for advocates to provide law enforcement, prosecutors, and other government entities with information to help them understand the role of the certification in enhancing their ability to detect, investigate and prosecute perpetrators of criminal activity.[100] Likewise, advocates may have to work with certifying agencies to help them understand when the certification may be signed. For instance, many law enforcement agencies will not sign a certification unless there is a prosecution. It is critical that these certifying agencies be educated about Congress's purpose and intent in creating the U Visa, discussed above. Practitioners should also be aware if agencies have developed procedures on how to submit a U-certification request and if there are any

[99] 8 C.F.R. § 214.14(a)(3) lists only head of agencies and supervisors, but CIS U policymakers have agreed that heads of agencies may designate other officers to be U supervisors, see Q & A with CIS and practice pointers from Federal Bar Association 2011 conference, both at www.asistahelp.org (last visited Oct. 15, 2024)). It is important to note that each judge is considered an eligible U Visa certifier. A trial judge is not required to seek certification authority from a chief judge.

[100] *See* Gail Pendleton, *Winning the U Visa: Getting the Law Enforcement Certification*, LEXISNEXIS EXPERT COMMENTARIES (Feb. 2008), https://asistahelp.org/wp-content/uploads/2018/12/Winning-U-Visas-Getting-Law-Enforcement-Certification.pdf.

mechanisms to ask the agency to reconsider or to appeal if the agency denies the requests.]

5. Violated the Laws of or Occurred in the United States

The final requirement is that the criminal activity either violated the laws of the United States or occurred in the United States.[101]

In looking at criminal activity that occurs outside the United States, the regulations specify that to be considered qualifying criminal activity for U Visa purposes, there must be a U.S. federal statute that creates extraterritorial jurisdiction that allows for prosecution in a U.S. court. For example, violation of the federal statute that allows prosecution of U.S. citizens and nationals who engage in illicit sexual conduct outside the United States, such as sexual abuse of a minor, would be considered a violation of U.S. law for U Visa purposes.[102]

While the criminal activity must have occurred in the U.S. or must have been in violation of a U.S. federal statute which extends extraterritorial jurisdiction, it is important to note that the survivor need not be in the United States in order to apply for a U Visa.[103] A survivor may submit an application from abroad. [104]

C. Waiver of Inadmissibility

There are several red flag issues that can make an applicant for lawful immigration status inadmissible into the United States. For instance, applicants for admission to the U.S. who are in the United States unlawfully, have certain criminal convictions, or suffer from certain health conditions are deemed inadmissible by statute. However, Congress recognized that many U Visa applicants will be inadmissible for one or more reasons and provided a waiver for these inadmissibility factors. For almost all grounds of inadmissibility, including for unlawful entry into the U.S., U Visa applicants may apply for a waiver; DHS will grant the waiver if

---

[101] Immigration and Naturalization Act § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV) (2006).

[102] 8 C.F.R. § 214.14(b)(4).

[103] 8 C.F.R. §§ 214.14(c)(5)(i)(A), (B).

[104] *Id*.

it determines it is in the public or national interest.[105] Waivers are not available for those who have committed Nazi persecution, genocide, or an act of torture or extra judicial killing.[106] Those who have committed violent or dangerous crimes and security-related crimes will only be granted waivers for extraordinary circumstances.[107]

D. Filing and Adjudication of the U Visa Applications

All U Visa applications should be filed with USCIS. A U Visa application submission must contain the following: a completed U visa certification, evidence proving each requirement, a signed statement by the applicant describing the victimization, and any inadmissibility waivers if applicable.[108] Applications filed by survivors outside of the United States must also be filed with USCIS following the same process as all other U Visa applicants. If the U Visa is approved for a survivor living in the United States, the applicant will receive a new I-94 entry document under the status "U-1." They will also receive their Employment Authorization Document ("EAD") valid for four years. If the U Visa holder does not already have a valid Social Security number, they may use the I-94 to apply for a Social Security number in order to start working. If applications were filed for the survivor's family members, the family member also gets an I-94 under either U-2 status for spouses, U-3 status for children, U-4 status for parents, or U-5 status for siblings. The family member will also be eligible for work authorization. If the derivative is abroad, they will need to begin a consular process, where they will complete documents with the Department of State, schedule an interview, and obtain a valid passport.[109] If the U Visa is denied, the applicant, through the help of an attorney, can file a motion to reconsider or reopen with USCIS or appeal to the Administrative Appeals

---

[105] Immigration and Naturalization Act § 212(d)(14).

[106] *Id*.

[107] 8 C.F.R. § 212.17(b)(2).

[108] 8 C.F.R. § 214.14(c)(2).

[109] *Id*. Because consular processing of U visas is relatively new and fraught with complications, experienced practitioners also recommend independent advocacy and follow-up at every stage of consular processing, including the initial transfer of information from the VAWA unit to the Department of State's Kentucky Consular Center.

Office.[110] However, USCIS regulations do not provide for an appeal to the Administrative Appeals Office of a denial of a waiver request.[111] The applicant also has the opportunity to re-apply if their application or waiver is denied.

> **[PRACTICE TIP**: Many clients are very concerned about filing any application with DHS because they fear that if they get denied, they will be deported. USCIS representatives have indicated that, in general, USCIS is not forwarding denied U Visa applicants' cases to DHS in order to open removal proceedings.[112] However, this practice is discretionary, and the agency practice has the possibility to change.[113] When advising clients, it is important to talk about both the risks and benefits of submitting an application so the client may make an informed decision.]

When Congress created the U Visa, it capped the number of U Visas that could be issued in any given year. DHS may only grant 10,000 principal U Visas per year. The cap does not count towards derivative family members who are included in an application. Once the cap is met, DHS may grant deferred action, which is a temporary legal protection that enables the recipient to apply for employment authorization. DHS will conduct a bona fide determination (see below) and if the applicant is not granted deferred action through this determination, the applicant can obtain deferred action by being placed on the waitlist under 8 C.F.R. 214.14(d)(12).[114] DHS will not grant U Visa status to family members before the main victim applicant receives U Visa status. Therefore, if the principal U Visa applicant is placed

---

[110] 8 C.F.R.§ 214.14(f)(6)(iii).

[111] 8 C.F.R. § 212.17(b)(3)

[112] Federal Bar Association Immigration Law Seminar (May 15, 2010).

[113] *See e.g.*, PM-602-0050.1 Updated Guidance for the Referral of Cases and Issuance of Notice to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens. (rescinded); Review of and Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities (Jan. 20, 2021) (rescinding 2018 Notice to Appear (NTA) Policy Memoranda).

[114] 8 C.F.R § 214.14(d)(2).

on the waitlist, the family members will also be placed on the waitlist and processed at the same time as the principal applicant.[115]

> **[PRACTICE TIP**: As of the publication of this manual, travel is not encouraged for U Visa holders. Although a U Visa holder may travel outside the United States, to re-enter they must apply for a re-entry visa at a U.S. Consulate abroad. U.S. embassies and consulates do not have uniform systems in place to issue these visas, and their officers may not be familiar with the U Visa re-entry process. Some embassies will not issue re-entry visas to U Visa recipients. Furthermore, some grounds of inadmissibility, i.e., those related to unlawful presence, are not triggered until a person leaves the United States and may result in penalties unless precautions have been taken.

1. Bona Fide Determination (BFD) & U Visa Waitlist

In June 2021, USCIS implemented the bona fide determination process which grants a victim applicant deferred action while they await the final decision for their U Visa petition. USCIS's goal was to promote efficiency in the application process by conducting an initial review of an application.[116] That initial review consists of determining if the principal petition is bona fide, meaning that: the principal petitioner properly filed the U Visa petition, the principal petitioner included a properly completed U Visa certification, the principal petitioner included a personal statement, and no significant red flags will come up after a background and security check on the principal petitioner is conducted.[117] If USCIS determines that the U Visa applicant's petition is bona fide, then the applicant will be granted employment authorization and deferred action for a period of four years. A derivative applicant who is residing within the United States may also be eligible for an employment authorization document under BFD. Individuals who received a BFD employment authorization do not need to pay a fee for

---

[115] *Id*.

[116] Practitioners should note that as of the preparation of this chapter, there is still a long wait to obtain BFD determination. Your client should be informed of BFD determination but not be led to believe that they can get a work permit immediately preceding the filing of their U Visa.

[117] See 3 USCIS-PM. 3.C(5).

initial BFD determination or renewal.[118] A grant of BFD is not equivalent to a U Visa approval, but is temporary protection (deferred action) that will allow the applicant to work while the U Visa is pending.

If an applicant does not receive a grant of BFD, the applicant will be considered for waitlist consideration. A waitlist determination entails a full evaluation of the eligibility requirements for U nonimmigrant status. If an applicant is placed on the waitlist, an applicant is considered eligible for U nonimmigrant status but will not receive the U Visa. The applicant will need to wait for a visa to be available but will receive employment documentation and deferred action, though it may take longer than the BFD process.[119] Derivatives residing in the United States may also be eligible for waitlist placement.

E. Lawful Permanent Residency for U Visa Holders

U Visa holders are eligible to apply for adjustment to lawful permanent status after holding U nonimmigrant status for three years. [120]If a U Visa holder wants to apply for lawful permanent residency but is not able to file before their U Visa expires, they may be able to get an extension of their U Visa status if: 1) the applicant's initial U Visa status was granted for less than four years in the aggregate; and 2) even if the four year aggregate period has been met, the certifying official states that the applicant's presence is necessary to assist in the investigation or prosecution of the criminal activity (in which case the applicant must submit a newly signed I-918B certification).[121] The statute also states that the U Visa may be extended beyond the four-year period in "exceptional circumstances."[122]

To be eligible for lawful permanent residence, the applicant must show that their presence in the United States is justified[123] on humanitarian grounds,

---

[118] See 3 USCIS-PM. 3.C(6).

[119] 8 C.F.R. § 274a.12(c)(14).

[120]Immigration and Naturalization Act § 245(m)(1), 8 U.S.C. § 1255(m)(1) (2006).

[121] 8 C.F.R. § 214.14(g)(2); 72 Fed. Reg. 53014, 53028-53029 (Sept. 17, 2007); 8 C.F.R. § 214.14 (g)(2); 72 Fed. Reg. at 53028-53029.

[122] Immigration and Naturalization Act § 214(p)(6).

[123] Immigration and Naturalization Act § 254(m); 8 C.F.R. § 245.24(d) (2009).

to ensure family unity, or is in the public interest. In addition, the applicant must:

- Show that they currently hold U nonimmigrant status;
- Demonstrate continuous and physical presence in the United States for a three-year period;
- Show that they did not unreasonably refuse to assist in the investigation or prosecution; and
- Present evidence that relates to admissibility and supports granting their lawful permanent residency as an exercise of DHS discretion.[124] Family members of the U-1 recipient holder must meet the same requirements to attain lawful permanent residency. [125]

The regulations also allow family members who were granted U Visa status to apply directly for lawful permanent residency. Family members with U Visa status applying for lawful permanent residency need to meet the same application requirements as the U Visa principal. The survivor's family member may petition for lawful permanent residency after the principal has already petitioned.[126] This is especially important in cases where the U Visa holder family member (U-2, U-3, U-4, U-5) has not yet accrued the three years of continuous physical presence needed to apply for lawful permanent residence.[127] If the family member applies for lawful permanent residency separately from the U Visa principal, they must submit a copy of the principal's I-918B or affidavit showing that the survivor did not unreasonably refuse to cooperate with law enforcement.

---

[124] Immigration and Naturalization Act § 245(m)(1); 8 C.F.R § 245.24(b); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Visa Nonimmigrant Status, 73 Fed. Reg. 75540, 75546-75551 (Dec. 12, 2008).

[125] Immigration and Naturalization Act § 245(m)(1)(a); 73 Fed. Reg. at 75546-75551.

[126] USCIS, Policy Memorandum (PM-602-0001) (June 22, 2010).

[127] As of this writing, USCIS has announced that those U-3 derivative children that reach the age of twenty-one before they adjust status will age out and will no longer be able to adjust their status to permanent resident; the derivative child must be below twenty-one when applying for permanent residency. USCIS Stakeholder's Phone Call, November 17, 2010. This problem is being scrutinized by national advocates and policymakers; please contact ASISTA for the latest developments at questions@asistahelp.org or manager@asistahelp.org.

VI. T NONIMMIGRANT STATUS FOR TRAFFICKING SURVIVORS AND THEIR FAMILIES

Many immigrant women, men and children suffer from human trafficking. Immigrants may be prone to trafficking in their journey to the United States, or after they have settled in the United States. With often insurmountable financial debt to their captors and little knowledge of services available, many trafficking survivors remain isolated. Traffickers use many weapons, including sexual assault, to subdue and control the individuals they traffic.[128] To combat human trafficking, Congress enacted T Visa protections for survivors of trafficking.[129]

A. Working with Survivors of Trafficking

The VTVPA defines severe forms of trafficking as: "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion or in which the person induced to perform such an act is under 18" (Article A); and "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 subjecting that person to involuntary servitude, peonage, debt bondage or slavery" (Article B).[130]

Your client may not immediately disclose facts to signify that they are a survivor of trafficking. In fact, they may not recognize or see themselves as a survivor of trafficking. They may have wanted to come to the United States for work or marriage, but upon their arrival found out that the job or partner they were promised did not exist. Instead, the person who brought them to the U.S. may have forced them to work in a brothel, a restaurant, or other business. They may refer to their trafficker as their spouse or partner, perhaps out of shame or habit, or the trafficker may in fact be their spouse or their partner.

If you think that someone you are assisting may be a survivor of trafficking, screen for the following information:

---

[128] *Id*.

[129] Victims of Trafficking and Violence Protection Act of 2000, PL 106-386, 114 Stat. 1464 (Oct. 28, 2000); 2000 HR 3244.

[130] *Id*.

- Are you free to come and go from your place of residence/work?
- Do you have access to your passport/identity documents?
- Are you paid for your work on a consistent, regular basis?
- Do you get to keep your wages, or do you have to give the money over to someone else?
- Does your boss, spouse, partner, or friend lock you in your room at night?
- Are you free to get together with other people from your country/culture?
- Do you owe your boss, spouse, partner, or friend a large amount of money for coming to the United States, or for your room, board, and other expenses?
- Has your boss, spouse, partner, or friend forced you to have sex with them or with others?

If the answers to these questions lead you to believe that your client has been trafficked, contact an appropriate resource. This may include an immigration attorney or victim service organization with training on trafficking and T Visas.[131]

B. Benefits of the T Visa

The T Visa is valid for a period of four years.[132] If the applicant's T Visa is approved, they will receive an Employment Authorization Documentation and an I-94 form evidencing their lawful status to the United States for the 4-year period. The status may be extended if the state, local, or federal law enforcement agency certifies that the presence of the survivor is necessary for the investigation or prosecution of the case.[133] The T Visa applicant's

[131] Information about, and legal representation for, survivors of trafficking is available through the non-profit Coalition to Abolish Slavery and Trafficking. *See* CAST LA, www.castla.org (last visited Oct. 2, 2024).

[132] Immigration and Naturalization Act § 214(o)(7); 8 C.F.R. § 214.11(p).

[133] Immigration and Naturalization Act § 214(o)(7)(B); 8 C.F.R. § 214.11(p). The TVPRA 2008 reauthorization amended the T Visa provisions to state that a T Visa may be extended if "Secretary of Homeland Security determines that an extension of the period of such nonimmigrant status is warranted due to exceptional circumstances." However, regulations have not been issued implementing this language.

qualifying family members will also be eligible to apply for work authorization and derive T nonimmigrant status. If the T Visa is denied, any benefits that the applicant received as a result of having filed a bona fide application, such as public benefits, shall be automatically revoked.[134]

C. Eligibility for T Visa

To qualify for a T Visa, an applicant must show that:

- They are a victim of a severe form of trafficking in persons;
- They are physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands or the port of entry thereto, on account of such trafficking in persons;
- If 18 years of age or older, they have complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking in persons;
- They would suffer extreme hardship involving unusual and severe harm if removed from the United States;
- They have not committed a severe form of trafficking; [135] and
- They are not inadmissible under INA § 212.[136]

An applicant who has applied for or been granted the T-1 nonimmigrant status may apply for T nonimmigrant status for their immediate family members who are admissible to the United States. A survivor who is unmarried and under 21 at the time of application may apply for admission for immediate relatives including their parents, children, and unmarried siblings under the age of 18.[137] If a survivor is over 21 years of age, they may apply for their immediate relatives including their spouse and children.[138] Trafficking survivors may also request T Visas for their parent or unmarried sibling under 18 years of age if these family members face

[134] 8 C.F.R. § 214.11(r).

[135] 8 C.F.R. §§ 214.11(b)-(c).

[136] Immigration and Naturalization Act § 212(d)(13). There are waivers for certain inadmissibility grounds for T Visa applicants.

[137] Immigration and Naturalization Act § 101(a)(15)(T)(ii)(I).

[138] Immigration and Naturalization Act § 101(a)(15)(T)(ii)(II).

present danger of retaliation as a result of the survivor's escape from trafficking or because of the survivor's cooperation with law enforcement.[139]

1. Severe Form of Trafficking in Persons

In making a determination as to whether an individual is a victim of a "severe form of trafficking in persons," USCIS must use all credible and relevant evidence.[140] The U.S. recognizes two primary forms of trafficking in persons: labor and sex trafficking Immigration law defines one who has been a victim of a "severe form of trafficking in persons" to be: (a) a person who has been recruited, harbored, transported, provided, or obtained for *labor or services*, or the purposes of a *commercial sex act*; (b) and, has been subject to force, fraud or coercion when made to engage in the labor, services, or the commercial sex act (except that there need not be any force, fraud, or coercion in cases of commercial sex acts where the victim is under 18); (c) and, for situations involving labor or services, the use of force, fraud, or coercion must be for the purposes of subjecting the victim to involuntary servitude, peonage, debt bondage, or slavery.[141] It is important to note that USCIS requires the applicant to bear the burden of providing evidence for both elements in the definition for trafficking, both a particular means (force, fraud, or coercion) and a particular purpose (sex trafficking, involuntary servitude, peonage, debt bondage, or slavery).[142]

> **[PRACTICE TIP**: It is important to discover the circumstances of the client's situation, whether they were forced into commercial sex acts or were sexually assaulted during involuntary servitude. Although it will be difficult to talk to the client about such specific details, explain to the client that such details are important in determining what type of trafficking

[139] Immigration and Naturalization Act § 101(a)(15)(T)(ii)(III).

[140] 8 C.F.R. § 214.11(d)(3).

[141] Victims of Trafficking and Violence Protection Act (VTVPA) of 2000, Pub. L. No. 106-386, § 103, 114 Stat. 1464, 22 U.S.C.A. § 7102(8); 8 C.F.R. § 214.11(a). Involuntary servitude, peonage, debt bondage, and slavery are statutorily defined. New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 4784, 4786 (Jan. 31, 2002).

[142] 67 Fed. Reg. at 4786-4787.

situation the client faced, meeting the requirements, and filing a successful T Visa application.]

2. Present in the United States

A survivor must have a "physical presence" in the United States to be eligible for T Visa relief. For purposes of the T Visa, "physical presence in the United States" means those who are present because they are currently being trafficked, or because they were subject to severe forms of trafficking sometime in the past and remain present in a U.S. jurisdiction.[143] The applicant does not need to demonstrate that they were trafficked into the United States. This requirement can still be met, even if the applicant entered lawfully or without inspection/parole, if there is evidence that they were trafficked while in the U.S. The TVPRA 2008 stipulates that persons who are allowed to enter the United States to participate in an investigation or judicial process in connection with the trafficking act are deemed physically present on account of trafficking.[144]

If a survivor has recently been freed or fled from the trafficking, they must show that they did not have a clear chance to leave the United States.[145] USCIS will consider relevant information in light of the individual applicant's circumstances.[146] Such evidence can include information about "trauma, injury, lack of resources, or travel documents that have been seized by the traffickers."[147] If the survivor leaves and returns to the U.S., they may not

---

[143] The term ''United States'' means the fifty States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the territories and possessions of the United States. VTVPA § 103(12); 67 Fed. Reg. at 4787.

[144] Trafficking Victims Protection Reauthorization Act of 2008 § 201(a)(1)(C); Immigration and Naturalization Act § 101(a)(15)(T)(i)(II); USCIS, Policy Memorandum (PM-602-0004), *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Changes to T and U Nonimmigrant Status and Adjustment of Status Provisions; Revisions to Adjudicator's Field Manual (AFM) Chapters 23.5 and 39 (AFM Update AD10-38)*, (Jul. 21, 2010).

[145] 8 C.F.R. § 214.11(g)(2).

[146] *Id*.

[147] *Id*.

be eligible for the visa unless it can be established that it was a result of the continued victimization of the trafficking or a new incident of trafficking.[148]

3. Reasonable Request for Assistance from Law Enforcement

To be eligible for the T Visa, the applicant also must show that they have complied with any "reasonable request for assistance" with investigations or prosecutions of the trafficker or trafficking enterprise (unless the applicant is under the age of 18).[149] A reasonable request for assistance is determined on an individual basis, based on the totality of the circumstances and may vary according to general law enforcement, prosecutorial, and judicial practices; the nature of the victimization (including degrees of mental and physical harm); and the age and maturity of the applicant.[150] Unless extreme circumstances are present, law enforcement will ask the applicant to comply with procedures similar to those applicable to comparably situated crime victims.[151] The only exceptions to this requirement for applicants are if the survivor is under 18 years or if the survivor can show that they are unable to cooperate with law enforcement due to their physical or psychological trauma from the trafficking.[152]

The survivor should make the decision about whether to involve law enforcement. A survivor must establish contact with a Law Enforcement Agency (LEA)[153] regarding the incident, either by reporting or responding to inquiries from the LEA, in order to prove that they have complied with any reasonable request to assist investigations or prosecutions.[154]

---

[148] 8 C.F.R. § 214.11(g)(3).

[149] 8 C.F.R. § 214.11(b)(3).

[150] 8 C.F.R. 214.11(a); 67 Fed. Reg. at 4787-4788.

[151] 67 Fed. Reg. at 4787-4788.

[152] Immigration and Naturalization Act § 101(a)(15)(T)(iii).

[153] The T Visa regulations define a LEA as any Federal law enforcement or prosecuting agency, including but not limited to the Federal Bureau of Investigation (FBI), USCIS, the United States Attorneys' Offices, the Department of Justice's Civil Rights and Criminal Divisions, the Department of Labor, the United States Marshals Service, and the Department of State's Diplomatic Security Service. 8 C.F.R. § 214.11(a).

[154] 8 C.F.R. § 214.11(h); 67 Fed. Reg. at 4788.

The T Visa application requires that the applicant provide evidence of their cooperation with law enforcement or their willingness to cooperate. An applicant can satisfy this requirement by submitting the I-914, Supplement B certification by an LEA, or other forms of evidence to prove this requirement.[155] Unlike the U Visa, an endorsement from an LEA (I-914B) is not required under the regulations for a T Visa applicant to satisfy the compliance with reasonable requests from law enforcement requirement. If the survivor wishes to report the crime to a law enforcement agency, a referral should be made to a specific contact person at the appropriate local law enforcement agency that meets the definition of "Law Enforcement Agency" listed in the T Visa regulations. The survivor will also need to secure the assistance of an advocate or attorney who is informed about and sensitive to trafficking survivors, and who can assist them with in cooperating with law enforcement. [156]

> **[PRACTICE TIP**: Discuss with your client how reporting to law enforcement may impact their safety and help them devise an appropriate safety plan. If possible, offer to have an attorney, immigration practitioner, or legal advocate accompany the survivor when they make their report.]

An LEA endorsement is not mandatory and should not be required by USCIS.[157] However, federal, state, and local law enforcement should sign the LEA certification in an effort to follow a survivor-centered approach. Applicants should be aware that submitting an LEA endorsement does not guarantee an automatic approval of the T Visa; USCIS will simply consider the LEA endorsement as one form of evidence to support the survivor's eligibility.[158] If an applicant cannot obtain an LEA endorsement, they can submit other forms of evidence, such as applicant's affidavit explaining every attempt to cooperate and attempts to obtain an LEA certification, a

---

[155] 8 C.F.R. § 214.11(h)(2-3).

[156] 8 C.F.R. § 214.11(f)(4). Information about, and legal representation for, survivors of trafficking is available through the non-profit Coalition to Abolish Slavery and Trafficking (www.castla.org) (last visited Oct. 15, 2024) and ASISTA (www.asistahelp.org) (last visited Oct. 15, 2024).

[157] 8 C.F.R. § 214.11(c)(3).

[158] *Id*.

statement, affidavit or signed LEA from state or local law enforcement officials investigating and/or prosecuting the survivor's traffickers under state law, trial transcripts, court documents, police reports, news articles, and copies of reimbursement forms submitted to and from courts.

Survivors who are identified by an LEA as potential witnesses to an investigation or prosecution may be eligible for a temporary immigration benefit called Continued Presence (CP).[159] CP provides trafficking survivors with a legal means to temporarily live and work in the U.S during the ongoing investigation into the crimes committed against them.[160] A survivor cannot affirmatively apply for CP on their own, the application must be submitted by a federal, state or local LEA with authority to investigate or prosecute human trafficking.

[**PRACTICE TIP:** If a survivor is actively working with a federal, state, or local LEA for the investigation or prosecution of the trafficking, practitioners should flag eligibility and advocate for CP.]

CP is granted for a two-year period and may be renewed in two-year increments; it also provides survivors with eligibility for federal benefits, an I-94, an employment authorization document, and protection from removal.[161]

4. Evidence of Extreme Hardship Involving Unusual and Severe Harm Upon Removal to the Country of Origin

A T Visa applicant must demonstrate that removal from the United States would subject the applicant to extreme hardship involving unusual and severe harm.[162] Extreme hardship takes into account both traditional extreme hardship factors (such as economic detriment or lack of social or economic opportunities) and also those factors associated with having

[159] 28 C.F.R. § 1100.35.

[160] 28 C.F.R. § 1100.35; *see also* Center for Countering Human Trafficking, *Continued Presence Resource Guide* (Sept 2023) [hereinafter "*Continued Presence Resource Guide*"] https://www.ice.gov/doclib/human-trafficking/ccht/continuedPresenceToolkit.pdf.

[161] *Continued Presence Resource Guide* at 6, 11.

[162] 8 C.F.R. § 214.11(i).

been a victim of a severe form of trafficking in persons. These factors include, but are not limited to:

- The applicant's age and personal circumstances;
- Serious physical or mental illness that necessitates medical attention not reasonably available in the country of origin;
- Nature and extent of the physical and psychological consequences of severe forms of trafficking;
- Impact of the loss of access to the United States courts and criminal justice system if removed to the country of origin; and
- Likelihood of re-victimization or threat to the individual safety if removed to the country of origin.[163]

D. Waiver of Inadmissibility

T Visa applicants are subject to the grounds of inadmissibility (*see* INA § 212 for grounds of inadmissibility). Although waivers are available to T Visa applicants, the waiver is not as broad as with the U Visa applicants. There are two inadmissibility waivers available to T Visa applicants: the general inadmissibility waiver under INA § 212(d)(13) and the T Visa specific waiver under INA § 212(d)(3). In addition to any waiver that is available under any provisions in INA § 212(a), DHS may waive any other inadmissibility ground if the activities rendering the applicant inadmissible were caused by or were incident to the victimization by trafficking.[164] For example, if a prostitution conviction makes the survivor ineligible and that was the activity that they were forced into when they were trafficked, a waiver may be granted. Generally, an applicant will present reasons why approval of the waiver is in the national interest. Some of the factors that USCIS will consider include but are not limited to: applicant's victimization; level of the survivor's cooperation with law enforcement; contributions to public safety relating to cooperation with LEA agency's investigation/prosecution of trafficking; community ties; and risk of harm if removed.[165]

[163] 8 C.F.R. § 214.11(i)(1).

[164] 8 C.F.R. § 214.11(d)(13); Yates Memorandum 2004, *supra* note 163, at 2.

[165] USCIS Policy Manual, Vol. 9, Ch. 3, Part O, Ch. 3.B.

E. Filing and Adjudication of the T Visa Application

All T Visa applications are filed with the USCIS. The application for the T Visa currently has no fee.[166] After USCIS has reviewed the T Visa application, confirmed that all required elements are met with prima facie evidence, and is satisfied with the background check, the application will then be deemed complete, ready for adjudication, and bona fide.[167] Once an application is deemed bona fide, DHS will issue a notice to the applicant stating that they have a bona fide T Visa application. Bona fide T Visa applicants qualify for the same public benefits as refugees.[168] Once a bona fide determination is made, DHS can then parole, grant deferred action to, and/or stay the removal of the T applicant until a final determination of them T Visa is made. Individuals granted deferred action, parole, or a stay of removal may be granted employment authorization in accordance with the respective interim status granted.

There is a 5,000-person limit on the number of T Visas awarded each fiscal year to survivors of human trafficking (called T-1 visas).[169] This cap does not apply to a T Visa survivor's qualifying family members.[170] Once the limit is reached on the number of T-1 visas that can be awarded each year to trafficking survivors, the VSC will continue to review all applications, but will not issue T Visas until the following fiscal year. Eligible applicants who do not receive a T-1 visa due to numerical limits will be placed on a waiting list.[171] While on the waitlist, the T-1 applicant enjoys the same status as

---

[166] As of April 2024, there is no fee for the T nonimmigrant form; however, USCIS may periodically change their immigration application fee schedule. It is best practice to check the USCIS website for the most up-to-date fee information, available at https://www.uscis.gov/g-1055 (last visited Oct. 15, 2024)

[167] *Bona Fide Application* means an application for T-1 non-immigrant status as to which, after initial review, USCIS has determined that there appears to be no instance of fraud in the application, the application is complete, properly filed, contains an LEA endorsement or credible secondary evidence, includes completed fingerprint and background checks, and presents *prima facie* evidence to show eligibility for T-1 non-immigrant status, including admissibility.

[168] VTVPA § 107, 22 U.S.C.A. § 7105. For more information, please refer to "Assessment of U.S. Government Activities to Combat Trafficking in Persons" pg. 12.

[169] Immigration and Naturalization Act § 214(o)(2).

[170] Immigration and Naturalization Act § 214(o)(3).

[171] 8 C.F.R. § 214.11(1).

those granted a bona fide T-1 visa with respect to them immigration status, access to benefits and employment authorization.

F. Lawful Permanent Residency for T Visa Holders

On December 12, 2008, the Department of Homeland Security issued regulations permitting T Visa holders and their family members to become lawful permanent residents after accruing three years of status as a T Visa holder. The current regulations state that the T Visa is not renewable, though it may be extended temporarily.[172] However, if a T Visa holder files for lawful permanent residency within the 90-day period before the third anniversary of the date of the T Visa approval, then the applicant shall continue to be in the T Visa status with all the rights, privileges, and responsibilities of a person possessing such status until the lawful permanent residency petition is decided.[173] If an applicant's T visa has been revoked, the applicant will not be eligible to apply for lawful permanent residency.[174]

In order for a T Visa holder to apply for lawful permanent residency they must:

- Have been admitted as a T nonimmigrant and continue to hold such status;
- Have been continuously and physically present in the United States for three years since the admission as a T Visa holder;
- Be admissible into the United States;
- Establish good moral character during continuous presence;
- Unless under the age of 18, establish that they complied with any reasonable request for assistance by law enforcement or establish that they would suffer extreme hardship upon removal from the United States;[175] and

[172] New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status, 67 Fed. Reg. 4784, 4791 (Jan. 31, 2002).

[173] 67 Fed. Reg. at 4791.

[174] 8 C.F.R. § 245.23(c).

[175] Immigration and Naturalization Act § 245(l); 8 C.F.R. § 245.23(a) (2009).

- Provide sufficient evidence to enable USCIS to favorably exercise discretion in order to approve the trafficking victim's lawful permanent residency application.[176]

[PRACTICE TIP: Be sure to consult with the client about their contacts with law enforcement, especially post-receipt of the T Visa. Although certain crime related inadmissibility might have been waived with the T Visa application, if the applicant has any new law enforcement contacts it is important to discover them as soon as possible.]

Derivative family members who received their T Nonimmigrant Status may also be eligible to apply for permanent residence. If they meet their own adjustment requirements, they can file their applications at the same time or subsequent to the principal's application for adjustment.[177]

All lawful permanent residency applications filed by T Visa holders should be filed with USCIS. USCIS will review all evidence submitted and issue a written decision. Currently, no interviews are required for T Visa holder lawful permanent residency applicants. If the lawful permanent residency is approved, the applicant will receive written notification of the approval. If the lawful permanent residency is denied, to the applicant may appeal the decision to the USCIS Administrative Appeals Office.[178] If the trafficking survivor T Visa holder's application for lawful permanent residency is denied, USCIS will automatically deny the applications for lawful permanent residency for all of the T Visa principal's qualifying family members.

VII. ASYLUM [179]

Asylum protects persons fleeing persecution. To qualify for asylum, applicants have to be physically present in the United States and must prove that they have suffered past persecution or have a well-founded fear of future persecution and cannot return home due to persecution on

[176] 8 C.F.R. § 245.23(e)(3); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75540-75545 (Dec. 12. 2008).

[177] 8 CFR § 245.23(b)(1).

[178] 8 C.F.R. § 245.23(i).

[179] *See generally*, Carra et al., *supra* note 5.

account of one of the following grounds: race; religion; nationality; political opinion; or membership in a particular social group.[180]

Asylum cases are complex legal matters and should be handled only by or under the guidance of an experienced immigration attorney. This overview will help you recognize when a sexual assault survivor may have an asylum claim,[181] including the elements of the asylum claim. Asylum applications have a one-year filing deadline from the date the survivor last entered the United States. If a survivor comes to you after they has been in the U.S. for more than one year, and you think they may be eligible for asylum, it is still important to refer them to screen them for asylum eligibility because there are two limited exceptions to the one-year filing deadline.

A. Benefits of Asylum

An individual who is granted asylum gains asylee status indefinitely. After receiving the grant for asylum, the recipient is eligible for public benefits and should consult their nearest Office of Refugee Resettlement to enroll in benefits since some benefits have expiration dates. Family members of the principal recipient of asylum can also derive asylee status. Spouses and children of asylee can derive asylee status so long as they can demonstrate that the familial relationship existed before the grant of asylum. After being physically present in the United States under asylee status, an asylee can apply for adjustment of status to permanent residency.

B. Eligibility for Asylum

1. Persecution

An applicant who has suffered harm in their home country has to establish that the harm rises to the level of persecution. Persecution is generally described as harm or suffering inflicted upon an individual in order to

[180] Immigration and Naturalization Act § 101(a)(42); 8 U.S.C. § 1101(a)(42) (2006).

[181] Note that sexual assault survivors may generally have a claim based on their sexual orientation or gender, but they may also have a claim based on other protected grounds such as political opinion, religion, or race.

punish the individual.[182] Persecution encompasses more than just harm.[183] Rape and other severe forms of sexual harm constitute harm amounting to persecution.[184] In determining whether the harm a survivor has suffered rises to the level of persecution, an adjudicator has to consider the circumstances of the case, even if they consider the harm to be "less severe harm."[185]

2. On Account of a Protected Ground

After an applicant establishes that the harm they suffered rises to the level of persecution, they must establish that the persecution was on account of one of the protected grounds. The asylum applicant will need to demonstrate that they suffered past persecution or have a well-founded fear of future persecution based on one of the five protected grounds: religion, race, social group, political opinion or nationality.[186]For example, although a survivor of sexual assault can establish that they have been persecuted in their home country, they will not win asylum simply because of the harm they suffered. There needs to be a clear articulation of a central reason the survivor suffered the harm, and that central reason must be "on account of" the individual's identity as it relates to at least one of the five protected grounds – that is, the harm must form a "nexus" with the protected ground(s). Gender, on its own, is not a protected ground; however, there may be a connection between a persecuted individual's gender and the reason(s) why they were harmed that can form a basis for protection. The protected ground of membership in a particular social group has evolved over the years and has been invoked in recent years, especially in cases that have a gender component. If upon speaking to your client, you learn, for example, that they were subject to domestic violence

---

[182] *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985), modified by *Matter of Mogharrabi*, 19 I&N Dec. 439, 446 (BIA 1987).

[183] *Matter of T-Z-,* 24 I&N Dec. 163, 169-71 (BIA 2007).

[184] *See* Memorandum from Phyllis Coven, INS Office of International Affairs, to INS Asylum Officers and HQASM Coordinators, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, (26 May 1995), at 9

[185] USCIS, *RAIO Directorate – Officer Training* (12/20/2019) https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAIO.pdf (May 2023).

[186] Immigration and Naturalization Act § 101(a)(42).

in their home country, think through some reasons of why the persecutor would harm your client.

In addition to gender, harm suffered can also be on account of the applicant's sexuality. This chapter will not go into depth of claims for applicants who identify as lesbian, gay, bisexual, transgender, or queer ("LGBTQ"), but the Board of Immigration Appeals has recognized that sexual orientation can be a basis for asylum.[187] If the survivor has suffered sexual assault in home country, conduct a thorough screening to determine all possible reasons related to the survivor's identity that the persecutor intended to overcome.

3. Unable and Unwilling to Control

An applicant for asylum has to also establish that the harm they suffered was inflicted by the government or a private actor that the government is unable or unwilling to control. In the case of private actors being the persecutor, the applicant has to show that they either sought protection from government officials (the police for example) and the government failed to control the persecutor or why they do not believe the government is able or willing to protect them. For example, if the survivor suffered domestic violence by their partner and they did not try to seek protection from the police or the court, they can show that the government does not have protections in place for domestic violence survivors. If the government has protections under the law for survivors to seek protection, the survivor can also show, through country conditions reports, that the police do not enforce these laws.

Asylum claims are complex and take a lot of preparation to execute. This section serves to provide a general understanding of asylum benefits, eligibility, and elements. Practitioners who believe their client is eligible for asylum should conduct thorough research on eligibility, case law, and country conditions.

[187] *See, e.g., Matter of Toboso-Alfonso*, 20 I&N Dec. 819 (BIA 1994) (establishing sexual orientation as membership in a particular social group and paving the way for asylum based on sexual orientation).

VIII. OPTIONS FOR SURVIVORS IN REMOVAL PROCEEDINGS

Some survivors may already be in removal proceedings when they seek assistance. They may still have options for affirmative applications and/or removal defenses based upon their victimization. Some may be ineligible for asylum because they are statutorily barred, but may be eligible for other protections.[188] These applicants may still have the option of applying for protection under withholding of removal under INA § 241(b)(3)(B) and protection under the Convention Against Torture ("CAT").

A. Victim-Based Remedies in Removal Proceedings

Survivors who have been ordered removed, have been removed from the U.S. or are in removal proceedings, are not necessarily precluded from filing affirmative applications based on their victimization. For example, a survivor may still file their U Visa application with DHS.[189] Additionally, VAWA may provide removal relief through Cancellation of Removal. For applicants in active removal proceedings and/or detained under DHS' custody, there are also mechanisms to advocate for the adjudication of an already pending U Visa application.[190] If a survivor is in removal proceedings, their options may include asking the immigration court to place the survivor's case in a Status Docket, to administratively close the survivor's case,[191] to terminate the survivor's removal proceedings, or grant the survivor a long continuance.[192] Whether these remedies will be granted will depend on the discretion of the immigration court. Timely referral to an

[188] INA § 208(a)(2). Applicants do not qualify for asylum when: (1) There is a safe third country that is not the United States or the applicant's country of origin to which the applicant can be removed (INA § 208(a)(2)(A); (2) The applicant fails to file for asylum within one year of entry into the United States and cannot qualify for the exception which requires that they demonstrate "either the existence of changed circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application within the period specified." (INA § 208(a)(2)(B) and (D)); or (3) The applicant has previously filed an asylum application which was denied. (INA § 208(a)(2)(C).

[189] 8 C.F.R. § 214.14(c)(1).

[190] 8 C.F.R. § 214.14(f)(2)(i).

[191] David L. Neal, Provide guidance to adjudicators on administrative closure in light of *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021).

[192] *See Matter of Mayen,* 27 I&N Dec. 755 (BIA 2020); *see also Matter of L-A-B-R-,* 27 I&N Dec. 405 (A.G. 2018) (providing guidance on whether a continuance should be granted when a respondent is pursuing collateral relief).

immigration practitioner can provide the survivor with essential victim-based protections and options to contest or terminate their removal.

> **[PRACTICE TIP**: Please note that filing motions to terminate or stays are complicated and require knowledge of immigration court procedures. When doing your intakes with the client, make sure to address all prior orders of removal. If the client is not sure whether there was an order, the advocate may call the Executive Office for Immigration Review ("EOIR") hotline at 1-800-898-7180 or access their EOIR case status online at https://acis.eoir.justice.gov/en/ to determine if an order of removal was entered against the client. It is also a good idea to submit a Freedom of Information Act ("FOIA") request to determine what is in the client's immigration file.]

B. Withholding Of Removal

Withholding of removal is an alternative protection for individuals fearing persecution in their country of origin. "withholding of removal" means that an individual in the United States may not be returned (or "removed") to a country when there are substantial grounds to believe that the individual would be in danger of being subject to torture in that country.[193] The standard of proof for withholding is a higher standard than for asylum. It is not sufficient for withholding applicants to show that they have a well-founded fear of persecution; instead, they must demonstrate a "clear probability that their life or freedom would be threatened if they were forcibly removed to their country of origin" on account of one of the protected grounds.[194] The federal courts have interpreted "clear probability" to mean that it is more likely than not that the applicant's life or freedom would be threatened.[195] In some cases where asylum has been denied due to a statutory bar, withholding has been granted instead.[196] There are bars to eligibility for withholding of removal under INA § 241(b)(3)(B).

---

[193] Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85.

[194] 8 C.F.R. § 208.16(b).

[195] See INS v. Cardoza-Fonseca, 480 U.S. 421, 440 (1987).

[196] *See, e.g.*, *Ismailov v. Reno,* 263 F.3d 851 (8th Cir. 2001).

C. Protection Under the Convention Against Torture

Protection under CAT is the third protection an individual who fears returning to their country of origin can seek. Under this protection, there are two separate types of protection: (1) withholding of removal under CAT and (2) deferred removal under CAT. First, an applicant for withholding of removal under CAT must establish that it is more likely than not that the applicant will be tortured in their country of origin if they were removed. Like an individual who has been granted asylum, an individual who is granted withholding and protection under CAT cannot be removed to their country of origin, but the government does have the authority to remove the individual to a third country. Recipients of withholding of removal or protection under CAT cannot adjust status to permanent residents, cannot seek protection for their family members under their application, but can be granted work authorization. Unlike asylum and withholding of removal, there are no bars to eligibility under CAT.

Only individuals in removal proceedings can apply for withholding of removal and protection under CAT. A USCIS asylum officer cannot grant an applicant withholding of removal or protection under CAT, only an Immigration Judge can make this determination. Form I-598 is used to apply for all three benefits (asylum, withholding of removal, and protection under CAT). Generally an applicant for asylum is also considered for withholding for removal, but an applicant must note on their application that they also want to be considered for protection under CAT.

If your client is in removal proceedings, conduct a thorough screening of the reasons why they fear returning to their home country and what type of harm, if any, they have suffered in their home country. Generally, asylum is always going to be the best option for an applicant for protection because it leads to a path to lawful permanent residence and certain family members can derive status.

IX. CONCLUSION

Immigration law is extremely complex, fact-specific, and any errors or omissions in documentation, pleading, or evidentiary support may be extremely difficult or impossible to rectify. For non-citizen sexual assault survivors especially, the right to remain in the United States legally may be

critical to their support and recovery. In addition, if you are assisting a non-citizen survivor on other matters, you must be cognizant of the potential impact any legal proceedings may have on the survivor's immigration rights or status.[197]

Because of their complexity, immigration cases are best handled by or under the supervision of an experienced immigration practitioner. If you are not an experienced immigration attorney/accredited representative or practitioner working under the supervision of an experienced immigration practitioner, it is not recommended for you to assist a survivor to submit a petition for T/U nonimmigrant status, VAWA self-petition, or application for asylum, withholding of removal or protection under CAT without the experience or proper supervision.

In addition, representing survivors from cultural and linguistic communities different from your own may pose added challenges. Your role as an advocate or non-immigration attorney is to support your client as they work with an experienced immigration specialist and to ensure that immigration concerns do not prevent them from pursuing the other remedies that may be available to them.

[197] For a discussion of the immigration consequences of civil protection order and family law proceedings see, Orloff & Sullivan, *supra* note 3.