

Chapter 8

Protection-Based Relief: Forging a Path to Permanent Status

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§ 8.1 GENERAL INFORMATION

Several sections of the United States immigration laws provide a means for clients to remain in the United States indefinitely, or temporarily with the possibility of eventual permanency in the case of U/T visas and special immigration juvenile status, for purposes of protecting the client from harm. The types of harm and the criteria to determine whether protection will be afforded vary. The initial benefits, if relief is granted, vary as well, but all of the forms of relief presented in this chapter ultimately lead to an opportunity to seek an indefinite, if not permanent status in the United States.

This chapter provides an overview of the basic forms of protection-based relief: asylum, withholding of removal, relief under the Convention Against Torture, U Nonimmigrant Status, and T Nonimmigrant Status, and special immigrant juvenile status.

As part of an initial consultation with a potential client, the lawyer should always screen for protection-based relief. Clients may not be intuitively aware that past harms or future fears would allow them an opportunity to remain in the United States. Moreover, rapidly shifting policies on protection-based relief require careful consideration before pursuing a claim. The past few years have seen sweeping changes to policies and regulations, often followed by intense litigation efforts to minimize their impact. Below are a few of the major changes impacting asylum-seekers.

- **Asylum Regulation Overhaul:** On Oct. 20, 2020, the Trump Administration issued final regulations designed to eviscerate the United States' asylum system. The rules, set to go in effect on Nov. 20, 2020, are the latest attempt to undermine the right to seek and enjoy asylum from persecution guaranteed in federal statute and international treaty.
- **Changes to Work Permit Eligibility and Processing:** New regulations impacting asylum seekers' access to an Employment Authorization Documents (EAD) went into effect on August 21, 2020 and August 25, 2020, though several provisions have been partially enjoined through litigation in *Casa de Maryland Inc. v. Wolf*, Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Key changes include dropping the 30-day processing time for initial EAD filings and limiting access to work permits for those who do not meet the one-year deadline, enter the U.S. illegally, and expand limitations for those with criminal histories.
- **COVID Bars to Asylum:** Proposed regulations were released in July 2020 to expand the ability of Department of Homeland Security (DHS) to prevent access to the asylum process during pandemics. The rule proposes to allow Customs and Border Patrol (CBP) to consider emergency public health concerns based on communicable disease as a bar to asylum. Specifically, it would allow CBP to bar asylum seekers whose entry they determine pose a risk of further spreading infectious or highly contagious illnesses or diseases, because of declared public health emergencies in the United States or because of conditions in their country of origin or point of embarkation to the United States, pose a significant danger to the security of the United States.
- **Safe Third Country Bar:** In July 2019, the United States implemented a new regulation requiring any refugee seeking asylum at the southern U.S. border who has passed through another country to have first asked for and been denied asylum in that country before seeking asylum in the United States. This policy, in effect, removes asylum as an option for individuals from Honduras, El Salvador, Guatemala, and others who are fleeing violence and persecution in their home countries and seeking safety in the U.S. The United States Supreme Court ruled in September 2019 that the proposed DHS rule may stand while being litigated in U.S. courts. On June 30, Judge Timothy Kelly of the U.S. District Court for the

District of Columbia struck down President Trump's second asylum ban, ending a restrictive policy that had virtually halted asylum at the southern border for the last year. The Ninth Circuit affirmed a preliminary injunction in the *East Bay* case in July 2020.

The Immigration Court and Asylum Office have initiated new policies to maximize efficiency in processing claims. Asylum claims filed after January 2018 can expect priority scheduling for interviews. See U.S. Citizenship and Immigration Services, *USCIS to Take Action to Address Asylum Backlog* (Jan. 21, 2018), available at <www.uscis.gov/news/news-releases/uscis-take-action-address-asylum-backlog>. The Director of the Executive Office for Immigration Review has instituted performance measures for immigration judges based on case completion times. See James R. McHenry, *Memo: Case Priorities and Immigration Court Performance Measure*, (Jan. 17, 2018), available at <www.justice.gov/eoir/page/file/1026721/download>. This will speed up the processing times for asylum claims filed following a credible fear interview. It will also impact the ability of respondents to continue a removal case while awaiting a decision on a benefit over which USCIS has jurisdiction, including U visas, T visas, and Special Immigrant Juvenile Status.

§ 8.2 ASYLUM, WITHHOLDING OF REMOVAL, AND RELIEF UNDER THE CONVENTION AGAINST TORTURE

Asylum, withholding of removal, and relief under the Convention Against Torture (CAT) are related forms of relief designed to protect individuals who fear returning to their country of origin due to persecution or torture. Each form of relief has separate elements to satisfy the legal standard, but the lawyer can prepare a request for all three forms of relief simultaneously using the application Form I-589 available on the USCIS website, <www.uscis.gov>.

The lawyer should keep in mind that asylum can be granted by USCIS asylum officers (Department of Homeland Security) or the immigration judge (Department of Justice), while withholding of removal and CAT relief can only be granted by the immigration judge.

Asylum offers the most protection of these three forms of relief. It is the only one that creates a path to permanent residence, reunification with some family members, and the opportunity to travel outside of the United States without forfeiting the protection offered under the immigration laws. Not all clients will be eligible for asylum, however, so it is important that the lawyer evaluate and pursue withholding of removal and CAT as alternative forms of relief if colorable claims exist.



PRACTICE TIP

Although the legal standards governing eligibility for asylum and refugee status are the same, refugee status can only be sought by individuals who are outside of the U.S. at the time they file their application for protection. See U.S. Citizenship and Immigration Services, *Flow Chart: United States Refugee Admissions Program*, available at <www.uscis.gov/sites/default/files/USCIS/Refugee%2C%20Asylum%2C%20and%20Int%27I%20Ops/USRAP_FlowChart.pdf> (explaining how refugees apply for status and the process they undergo prior to being admitted to the United States). In contrast, the asylum process exists to permit individuals already present in the U.S. or who present at a U.S. port of entry seeking protection, to apply for that protection from inside the United States. See INA § 208(a).

§ 8.4 U VISA

The U visa is a nonimmigrant visa that is a form of protection-based immigration relief for victims of serious crimes. Beneficiaries of a U visa are able to apply for permanent resident status after three years in U visa status. Unique to the U visa is a requirement to have a certification signed by a law enforcement agency confirming the applicant was helpful, and currently is being helpful, or will likely be helpful in the investigation or prosecution of the case. The applicant must also include a personal statement establishing she or he suffered serious physical or emotional harm as a result of the crime. Each of the requirements is outlined below, followed by a summary of evidence to include in the filing. *See* INA § 101(a)(15)(U); INA § 214(p); 8 C.F.R. § 214.14.

A. Eligibility

In order to be eligible for a U visa, the applicant must meet the following criteria:

- be a victim of a qualifying criminal activity;
- the crime occurred in the United States or violated United States laws;
- have suffered substantial physical or mental abuse as a result of the crime;
- have information about the criminal activity;
- be helpful to law enforcement in the investigation or prosecution of the crime; and
- be admissible to the United States.

See INA § 101(a)(15)(U); INA § 214(p); 8 C.F.R. § 214.14.

1. Victim of Serious Crime

USCIS provides a long list of crimes that qualify for a U visa including domestic violence, extortion, prostitution, and sexual assault. It also includes a catch-all “other related crimes” that encompasses “any similar activity where the elements of the crime are substantially similar.” Further, the provisions also include attempt, conspiracy, or solicitation to commit any of the above and other related crimes. *See* 8 C.F.R. § 214.14(a)(9). The USCIS publishes a list of qualifying criminal activities on their website, <www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/victims-of-criminal-activity-u-nonimmigrant-status>.



PRACTICE TIP

In some instances, applicants may qualify for a U visa as “indirect” victims of qualifying crimes if the direct victim is unable to provide information concerning the criminal activity due to incompetence or incapacitation or if the victim is deceased due to murder or manslaughter. *See* 8 C.F.R. § 214.14(a)(14).

2. Crime Occurred Within the United States or Activity Violated a Federal Extraterritorial Jurisdiction Statute

In order for a qualifying crime to exist, the United States government or any state/local government therein needs to have the capacity to investigate and prosecute the crime. The criminal activity needs to have occurred in the United States or violate a United States federal law that provides for extraterritorial jurisdiction to prosecute the offense in a United States federal court. *See* 8 C.F.R. § 214.14(b)(4).

3. Suffered Substantial Abuse

Regulations require a case-by-case analysis to determine whether the applicant suffered substantial abuse as a result of having been a victim of qualifying criminal activity. Several factors are specifically listed for consideration, including:

- the nature of the harm inflicted or suffered;
- the severity of the perpetrator’s conduct;
- the severity of the harm suffered;
- the duration of the infliction of harm; and
- the extent to which there is permanent or serious harm to the appearance, health, or physical or mental soundness of the victim, including aggravation of pre-existing conditions.

See 8 C.F.R. § 214.14(b)(1).



PRACTICE TIP

For cases involving long-term harm such as domestic abuse, the lawyer should include information regarding past incidents of abuse, regardless of whether they were reported to the police. A series of incidents taken together may constitute serious harm, even where no single incident by itself would be considered substantial.



PRACTICE TIP

When submitting medical documentation, the lawyer should include narrative reports from treating physicians, psychologists, or other medical professionals whenever possible. The lawyer should avoid submitting duplicative or exceptionally technical medical records without explanation. In general, reports from mental health professionals who provide ongoing treatment are viewed more favorably than those providing limited forensic mental health evaluations.

4. Have Information About Qualifying Crime

The applicant must have credible and reliable information about the qualifying crime. This information will form the basis for the certifying official to determine the applicant has, is, or is likely to provide assistance to the investigation or prosecution of the qualifying criminal activity. *See* 8 C.F.R. § 214.14(b)(2).



CAVEAT

If the applicant is under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may have the necessary information about the crime for purposes of satisfying this element. *Id.*

5. Cooperate In the Investigation or Prosecution Of Crime

The applicant must have been helpful, is helpful, or is likely to be helpful in the investigation or prosecution of the crime. This element is satisfied by obtaining the law enforcement certification on Form I-918, Supplement B, U Nonimmigrant Status Certification. Note that the regulations require ongoing cooperation, noting that “since the initiation of the cooperation, [the applicant] has not refused or failed to provide information and assistance reasonably requested.” *See* 8 C.F.R. § 214.14(b)(3). The same caveat applies that family, friends, and guardians can serve in the applicant’s place if the applicant is under the age of 16 or otherwise incapacitated.



PRACTICE TIP

The Immigrant Legal Resource Center (ILRC) has created a guide to obtaining a U visa certification. *See* Sally Kinoshita & Alison Kamhi, *A Guide to Obtaining U Visa Certifications*, Immigrant Legal Resource Center (Practice Advisory July 2017), available at <https://www.ilrc.org/sites/default/files/resources/u_vis_a_certification_advisory_ab.ak_.pdf>.

6. Be Admissible To the United States

The U visa includes several generous waiver provisions. If a ground of inadmissibility applies, the applicant can submit a waiver on Form I-192, Application for Advance Permission to Enter as a Nonimmigrant.

**PRACTICE TIP**

Under the new regulations on fees (which are under federal injunction as of the time of publication of this 2020 Deskbook Update), U visa applicants are still eligible for fee waivers of all fees related to their case. However, at the time of writing, the authors are seeing increased push-back on fee waivers by USCIS, so practitioners should be sure to submit their request early to allow time to re-submit and/or raise the funds to pay the fee.

B. Process

Applications for U visas are submitted to the USCIS Vermont Service Center. The lawyer should review the application instruction sheet for the most current address at the USCIS website, <www.uscis.gov/i-918>.

**PRACTICE TIP**

Though the qualifying crime needs to have occurred in the United States, an applicant can be residing outside the United States while applying for the U visa. If granted, the applicant would consular process at the United States consulate in the country where she or he is residing.

The application packet should include the following:

- Form I-918, Petition for U Nonimmigrant Status;
- Form I-918, Supplement B, U Nonimmigrant Status Certification, signed by an authorized official of the certifying law enforcement agency;
- Form I-192, Application for Advance Permission to Enter as Nonimmigrant, if any grounds of inadmissibility apply;
- personal statement describing the criminal activity; and
- evidence to establish each eligibility requirement.

U visa applications are adjudicated exclusively on the paper application. The client will not be called for an interview. The processing goal is four months, but at the end of FY2017, USCIS reported that over 100,000 applications were pending. As of June 2020, USCIS reported processing times of approximately 56–56.5 months for U visa applications. If additional evidence is required, the VSC will issue a request for evidence and allow the applicant an opportunity to answer questions or offer additional evidence in response to the request. If the VSC does not plan to grant the application, a “Notice of Intent to Deny” will be issued describing the reasons the application may not be approved. The applicant will have an opportunity to respond before a final decision is issued.

**PRACTICE TIP**

Attorneys can contact USCIS directly for updates on case status and to update USCIS regarding address changes:

- Email: HotlineFollowupI918I914.vsc@uscis.dhs.gov; or
- Call USCIS at 802-527-4888.

The Nebraska Service Center joined the Vermont Service Center in reviewing U visa applications starting in June 2016. Cases that have been transferred or are being adjudicated by the Nebraska Service Center can send inquiries to: nsc.i-918inquiries@uscis.dhs.gov.

C. Benefits

A pending U visa can lead to administrative closure or termination of removal proceedings. The lawyer should also note that clients with removal orders are not barred from filing U visa applications and can file for the U visa from outside the United States. In instances where the client is in immigration detention, the lawyer may be able to request that the proceedings be continued in order to file the U visa application, but a pending U visa application may not be sufficient to terminate proceedings. Thus, in some situations, the client may wish to accept a grant of voluntary departure and return to the United States if the U visa is granted.

D. Adjustment of Status for U Visa Holders

U visa holders are eligible for permanent residence three years after being granted. The lawyer should note, however, that the applicant must apply for permanent residence before the fourth year or the U visa benefits will be lost.

In order to qualify to apply for adjustment of status, the U visa holder must meet the following criteria:

- have been lawfully admitted in U-1 nonimmigrant status;
- be in U-1 nonimmigrant status at the time the Form I-485 is filed;
- have been physically present in the United States for a continuous period of at least three years since:
 - admitted as a U-1 nonimmigrant; or
 - at the time the Form I-485 is filed;
- must continue to be physically present through the date that USCIS makes a decision on the adjustment application;
- must not have unreasonably refused to provide assistance in the investigation or prosecution of the qualifying criminal activity, starting from when the client was first admitted as a U-1 nonimmigrant through the date that USCIS makes a decision on the adjustment application;

- not be inadmissible under INA § 212(a)(3)(E) (Nazi persecution, torture, genocide, extrajudicial killing);
- establish that their presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest; and
- merits a favorable exercise of discretion.

Practitioners should follow the USCIS instructions for filing the adjustment of status application found on the USCIS website.

The required documentation that is unique to U visa holders includes:

- (1) Evidence of U Visa Status
 - Copy of Form I-797, Approval Notice, for Form I-918, Petition for U Nonimmigrant Status
- (2) Continuous Presence and Travel
 - Copies of every page of all passports or equivalent travel documents that were valid while in U-1 nonimmigrant status (or a valid explanation of why this evidence is not available);
 - Documentation of any departure from, and return to, the United States while in U nonimmigrant status, including:
 - date of departure;
 - place of departure;
 - length of departure;
 - manner of departure (plane, boat, etc.);
 - date of return; and
 - place of return.
- (3) If absent from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days, certification from the investigating or prosecuting agency that signed Form I-918B stating that:
 - the absence was necessary in order to assist in the investigation or prosecution of the qualifying criminal activity; or
 - the absence was otherwise justified.
- (4) Evidence establishing continuous physical presence, including but not limited to:
 - documentation issued by any governmental or nongovernmental authority as long as the documentation contains the client's name, was dated at the time it was issued, and contains the normal signature, seal, or other authenticating instrument of the authorized representative of the issuing authority;

- educational documents;
 - employment records;
 - certification of having filed federal or state income tax returns showing school attendance or work in the United States throughout the entire continuous physical presence period;
 - documents showing installment payments, such as a series of monthly rent receipts or utility bills; or
 - a list of the type and date of documents already contained in the DHS file that establishes physical presence, such as, but not limited to, a written copy of a sworn statement given to a DHS officer, a document from the law enforcement agency attesting to the fact that the applicant has continued to comply with requests for assistance, the transcript of a formal hearing, and Form I-213, Record of Deportable-Inadmissible Alien.
- (5) The client's affidavit attesting to the continuous physical presence. If the client does not have documentation to establish continuous physical presence, they must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the client's continuous physical presence with specific facts.
- (6) Ongoing compliance with requests for assistance:
- a newly executed Form I-918, Supplement B, U Nonimmigrant Status Certification;
 - a photocopy of the original Form I-918, Supplement B, with a new date and signature from the certifying agency;
 - documentation on official letterhead from the certifying agency stating that the client has not unreasonably refused to cooperate in the investigation or prosecution of the qualifying criminal activity;
 - court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of other witnesses or officials;
 - an affidavit describing any efforts the client made to obtain a newly executed Form I-918, Supplement B, or other evidence describing whether the client received any requests to provide assistance in the criminal investigation or prosecution of the qualifying criminal activity, and the response to these requests. If submitting an affidavit, it must include:
 - a description of all instances when the client was requested to provide assistance in the criminal investigation or prosecution of persons in connection with the qualifying criminal activity after the client was granted U nonimmigrant status and how the client responded to such requests;
 - any identifying information the client has about the law enforcement personnel involved in the case;
 - any information the client has about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons why; and

- if the client has refused a request for assistance in the investigation or prosecution, the client must provide a detailed explanation of why they refused to comply with requests for assistance and why the client believed that the requests for assistance were unreasonable.



COMMENT

In cases where the U-1 petitioner was a child (or incompetent or incapacitated) and was not directly required to provide the assistance in an investigation or prosecution of the qualifying criminal activity, someone other than the child, such as a parent, guardian, or next friend may need to provide evidence of continued assistance (or that there was no unreasonable refusal to comply) with an investigation or prosecution of the qualifying criminal activity.

E. Discretion

A U visa may be granted where there is evidence that adjustment of status is warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

The limit on the number of U visas that may be granted each year is 10,000. If the cap is reached before all pending U visa applications have been adjudicated in a given year, USCIS will grant deferred action to applicants on the waiting list. Applicants with deferred action are eligible to apply for work authorization.



PRACTICE TIP

Although there *is* a cap on the number of U visas that can be issued to principal applicants, there is *no* cap on the number of derivative visas that can be granted.

F. Dependents

The U visa has a generous definition of qualifying family members who can receive derivative U visas, particularly for those under 21 years of age. U visa holders who are under 21 years of age may file for derivative benefits for their spouse, children, parents, and unmarried siblings under the age of 18. Note that special age-out protections are available for U derivatives. Be sure to check those and apply to lock-in ages given the long backlog of U visa processing. U visa holders who are over 21 may file for derivative benefits for their spouse and children. Applications for qualifying family members are made on Form I-914, Supplement A, Application for Immediate Family Member of U-1 Recipient.



PRACTICE TIP

In September 2016, USCIS accepted the USCIS Ombudsman's recommendation to implement a parole policy for U visa petitioners and qualifying relatives who live abroad. The policy is intended to allow individuals to enter or re-enter the United States while they are on the waitlist. USCIS has yet to issue detailed guidance on the procedures to request parole in this context.

G. Appeals

If a U visa application is denied, it can be appealed to the Administrative Appeals Office (AAO) for paper review.

§ 8.5 SPECIAL IMMIGRANT JUVENILE STATUS

Special immigrant juvenile status (SIJS) is a form of protective relief that may only be granted by the U.S. Citizenship and Immigration Service (USCIS). It is one of several “special immigrant visas” that USCIS has designated for specific groups of individuals. SIJS is designed to protect children who have been abused, neglected, or abandoned by one or both of their parents. The abuse, abandonment, and/or neglect could happen either in their home country or in the United States, provided that the child meets the other eligibility requirements to receive SIJS. Unlike many forms of immigration relief, it requires special findings from a state court before the child can apply for SIJS status through a self-petition with USCIS. Once the child's self-petition is approved, the child may immediately apply for permanent residency if the proper visa is available, without having to leave the country to adjust status through the U.S. consulate in their country of origin. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11; INA § 245(h).

Attorneys should ensure that they review the USCIS Policy Manual Sections on special immigrant juvenile status and special immigrant-based adjustment of status before submitting any documentation to an adjudicator. Both sections of the USCIS Policy Manual are available at the USCIS website, <www.uscis.gov>.



CAVEAT

SIJS regulations appear to be in their final stages and the authors expect a final rule soon. The comment period closed in 2019 and it is still unclear what the final rule will entail. That said, if attorneys have any I-360s that are close to being finished, it may be best for to file these applications as soon as feasible. The proposed regulations contained restrictive prohibitions that may negatively impact adjudication. For example, the proposed regulations changed the consent function so that it denied all one-parent cases. To read more about the proposed rules visit the Office of Information and Regulatory Affairs website, <www.reginfo.gov/public/do/eoDetails?rrid=131233>.

Regulations are typically set to be effective/implemented 30 days after the final rule is published. Any practitioners who have recently received predicate orders should finalize their SIJS applications and file them as soon as they are able.

Appendix A – Application Comparison Chart

	Asylum	SIJS	T-Visa
Adjudication Process	1 month to 5 year waiting period for interview. If UAC stripped, must pursue in adversarial proceeding before the immigration judge.	Family court adjudication separately from immigration. Immigration process requires filing forms/evidence. Processing times with USCIS are 1-2 years.	Personal affidavit required with application filing, evidence of LEA reporting and eligibility as victim of trafficking. Approximately 2 year waiting process; no in-person interview.
Adjudication Substance	USCIS interview focuses on asylum eligibility – often extensive questioning regarding past trauma.	USCIS interview which focuses on biographic information and admissibility, and not on abuse/neglect/abandonment (deference to state court).	Paper application with no interview.
Green card eligibility	Can apply for green card 1 year after grant.	Backlog means long wait for green card from certain countries. Can concurrently file with green card application, if from certain countries that do not have a backlog.	Eligible to file three years after T-Visa grant or if the investigation and prosecution of acts of trafficking are completed, as determined by the Attorney General. (Written statement included with adjustment application).
International Travel	Must apply for refugee travel document while in asylee and LPR status. Advisable not to return to home country even after green card granted.*	No restrictions on travel to home country, once green card granted.	May use valid T-Visa in your expired passport along with a new valid passport for travel and admission to the United States—must get T visa in passport; cannot use approval notice alone. Can apply for advance parole. Generally should not travel during pendency of T and investigation. Travel to home country not advised as it may undermine hardship arguments, resulting in revocation of T.
Public Benefits	Access to broad array of public benefits	Access to some public benefits	Extensive benefits

	Asylum	SIJS	T-Visa
Derivatives (Family Reunification) –Eligibility	Spouse and children <21 at time of filing.		Principal < 21: Parents, spouse, unmarried siblings under 18, unmarried children under 21; and children (any age) of other beneficiaries who face immediate danger due to trafficking. Principal > 21: Spouse, children (unmarried under 21); and children (any age) of other beneficiaries who face immediate danger due to trafficking.
Derivatives – Restrictions	Can apply for other family members after obtaining green card. After asylee obtains green card, and then U.S. citizenship, can sponsor parents and siblings for immigrant visa.	Cannot ever petition parents for an immigration benefit. (triggers at adjustment based on SIJS?).	Must be in T status to petition—cannot adjust before. Once adjusted, can petition for family members the same as any other green card holder (spouse, children) or citizen (parents, siblings, spouse and children).
Derivatives (Family Reunification) – Process	Can include spouse and children on application or apply for them within 2 years of grant.	Cannot include derivative beneficiaries in application, but as LPR, can sponsor spouse and children.	Can file at the same time as principal application or any time after grant, so long as unadjusted T. NOTE: IOM will help coordinate/pay for travel docs and travel for derivatives.