



VSC Stakeholder Notes¹

VAWA Teleconference 9.28.12

NOTE: We have organized the questions and answers into categories and added practice pointers and clarifying information where relevant. The stakeholder call began with a “webex” which is the training webinar VSC uses for law enforcement. We have included useful information from that webex, though it was not necessarily presented as Q & A.

I. U visas

A. General Questions

From Webex presentation (information designed for law enforcement and very basic, hence our clarifying details and practice pointers)

1. VSC has received and approved U visa applications from all the crime categories.
2. A law enforcement agency may disavow or withdraw certification at anytime in the process if the victim stops cooperating. They can notify VSC with a letter, which can be scanned and emailed or mailed to VSC.
 - a. **ASISTA Practice Pointers:** Since all applicants have the right to see and respond to derogatory information (see discussion of NOIRS below at page 6), the letter the law enforcement agency sends to disavow or withdraw a Supplement B should state the reasons why the agency is withdrawing/disavowing the certification. If it is for refusal to continue to be helpful, it should specifically describe why the victim’s refusal to cooperate is unreasonable. Obtain a copy of this letter and if appropriate, respond both to the law enforcement agency and to VSC regarding the allegations in the letter. This will probably be seriously detrimental to your case, so to avoid this happening:
 - Advise your client of the potential adverse consequences of refusing to be helpful to law enforcement, working with a victim advocate to empower

¹ Cecelia Friedman Levin & Sonia Parras of ASISTA Immigration Assistance prepared this document, with assistance from Gail Pendleton.

your client through the process and decision-making. The advocate should help explain to your client why law enforcement officers need the help they are requesting and, in turn, explain to law enforcement why your client may be afraid to provide the help requested. Through this process, you should be able to find a “common ground” that satisfies both law enforcement and your client.

- Memorialize your contact with law enforcement, keeping a running record in your file of how and when the client worked with a certifying agency. Include names and contact information of those contacted, and the information and other help your client proffered and provided. This will help refresh the memory of both law enforcement and your client, serve as additional documentation for your client’s helpfulness and “information possession” eligibility requirements. You may also need to refer back to this at the adjustment phase, especially if the case was closed, so you can explain why a second declaration is not required (see discussion below at page 14)
3. If a qualifying crime was investigated but the perpetrator was charged with a crime that is not a qualifying crime, will that be held against a U applicant?
- a. **VSC Answer:** If the Supplement B (certification) says that a qualifying crime was investigated and the evidence supports that, VSC does not hold what the perpetrator was ultimately charged with against the victim.
 - b. **ASISTA Practice Pointers:** The preamble to the U visa regulations² and the DHS Guide³ at page 13 address this issue. This reflects the law’s provisions, which require that a qualifying crime be “investigated or prosecuted” not both. Law enforcement may investigate an array of crimes and charge only those for which they have the best evidence or which will result in the most jail time for the perpetrator.

The attorney/accredited representative and the victim advocate partners should discuss with potential certifiers what crimes were investigated BEFORE the certifier fills out the form. Remember that law enforcement officers know more than you do about the range of crimes they investigate and that may fall under one of the U visa categories (e.g., choking, stalking,

² “New Classification for Victims of Criminal Activity; Eligibility for ‘U’ Nonimmigrant Status,” 72 Fed. Reg. 179 p.53018. (September 17, 2007).

³ U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement http://www.dhs.gov/xlibrary/assets/dhs_u_vis_a_certification_guide.pdf

misdemeanor assaults *may* be domestic violence crimes, depending on the facts, even though those crimes are not listed in the U statute). Remember also that victim advocates have more experience working with law enforcement than attorneys/accredited reps and therefore are more likely to have the relationship of trust with certifiers necessary to have a productive discussion.

4. If Law Enforcement Agency (LEA) certifiers want to add more information about, say, helpfulness, they should write “see addendum” or “see attached” in the space and then attach the additional information.
5. If the victim was a USC (US citizen), why would parents be considered as victims?
 - a. **VSC Answer:** Parents of USC victims may be recognized as victims for U visa purposes if the victim child was under 21 at the time the crime occurred. They will have to show they suffered substantial harm and were helpful to law enforcement.
 - b. **ASISTA Practice Pointers:** This is really a discussion of the “indirect victim” category. An indirect victim is defined at 8 CFR 214.14(a)(14)(i) and includes two categories of certain family members of the direct victims: where the victim is (1) deceased, or (2) incompetent, or incapacitated and therefore not able to give information concerning the qualifying crime. VSC seems to be discussing the second group in their answer, which generally includes children. The most common example of an indirect victim in this category is a parent of a sexually abused child.

According to the regulations, only spouses, unmarried children under 21, parents and siblings under the age of 18 (if the direct victim is under 21) may be considered indirect victims. They must show that they were helpful to law enforcement in the investigation/prosecution of the crime.

In these cases, it’s best if the certification *identifies the indirect victim parent as the victim*, not the child victim. This will be confusing to the certifier, but the DHS Law Enforcement Certification Guide (at page 13) is a useful advocacy tool for explaining this to law enforcement agencies. http://www.dhs.gov/xlibrary/assets/dhs_u_visa_certification_guide.pdf

Questions from the field (either over phone or in person):

6. For U visa applicants, is it necessary to submit criminal record clearances?
- a. **VSC Answer:** NO—VSC will request biometrics for U visa applicant.
 - b. **ASISTA Practice Pointers:** Request an FBI record if in doubt regarding criminal records or charges at the border including expedited removals or false claims of USC. Applicants can get their fingerprints taken and then submit them to the FBI with a written request and \$18 money order. If a client is uncomfortable going to local law enforcement to get their fingerprint card filled, there may be a local business or social services who may be able to assist. For more information about the FBI fingerprint procedure, visit: <http://www.fbi.gov/about-us/cjis/background-checks/submitting-an-identification-record-request-to-the-fbi>

Although it's technically true that U applicants need not provide police clearances, as VAWA self-petitioners must do to prove good moral character, U applicants must overcome criminal issues that are inadmissibility bars. You should, therefore, address the applicant's criminal record both on the I-918 form itself (Part 3: Question 1 part a-i) and also on the I-192 inadmissibility waiver application, assuming inadmissibility issues may be raised by the criminal history. In general with the VSC VAWA/U unit, it is better to acknowledge and explain as much as possible up front, to avoid raising credibility concerns and delaying approval while VSC issues a Request for Evidence (RFE) concerning the criminal history. That said, be sure not to assume that your client has convictions and inadmissibility issues where there may be none, e.g., a typical argument might be: (1) this is not a conviction and if it is, (2) it's not a crime of moral turpitude and (3) if you think it is, here's how we meet the national/public interest waiver under 212(d)(14.) (you should make sure your I-192 identifies (d)(14) as the waiver you are seeking, not (d)(3), e.g., cross out (d)(3) and write in red (d)(14)).⁴

7. What is the VSC definition of "direct and proximate harm?"
- a. **VSC Answer:** In context of bystander cases, this means that an individual was "really really close by" or "within the bubble." They referenced the

⁴ For more suggestions on how to address and overcome U inadmissibility, see resources on the ASISTA website - www.asistahelp.org, in the U section of the "Clearinghouse."

discussion in the introduction to the regulations: a pregnant woman is next to someone who is shot and falls into her. The woman goes into labor and loses the baby due to the trauma. The harm must be egregious and unusual.

- b. **ASISTA Practice Pointers:** Bystander victim cases are extremely difficult to win. It's generally better to try to frame the person as a direct victim, focusing on the direct and proximate harm, which is the requirement for direct victims, not just bystanders (this was a confusing conflation, since all victims must show direct and proximate harm), see 8 CFR 214.14(a)(14).

Family members of victims of manslaughter or murder qualify as indirect victims (the first category of indirect victim, as noted above but not discussed by VSC). As with all such cases, you must document that the “substantial harm” flowed from the qualifying U crime.

Remember that Congress specifically did NOT include witnesses as qualifying for U visas, and that the U visa is not a panacea for all victims of crimes. Although you will not necessarily expose applicants to removal by proffering cases that push the envelope, note that VSC must obtain any existing files on the applicant from other parts of DHS. When it makes a decision, it must notify those parts of the agency of the result. This is the most likely way a U applicant would be exposed to removal, so be sure you know what other parts of DHS have files on your client before filing a case that does not fall squarely in the direct or indirect victim categories.

- 8. What should advocates do if they have a large number of victims related to one criminal case? Would VSC consider establishing some process for filing en masse (for 12-13 applicants)?
 - a. **VSC Answer:** Advocates must send in all docs for each case. At times VSC has done this with T cases, but not in the U context.
 - b. **ASISTA Practice Pointers:** There are pros and cons of doing it this way (en masse); on the one hand, what we've seen with the T example they gave is that different adjudicators treat the same facts differently, which can be good or bad, depending on which adjudicator you get. On the other hand, we've also seen them revoking or rethinking grants for T visas that came out of the same facts, so it may be prudent to get them all done by the same adjudicators, so you can identify and work out issues up front. Finally, remember that each case may pose different inadmissibility issues, so they are not really “the same” in all aspects.

9. Why did VSC send me an RFE asking for a formal argument about national or public interest when EWI was the only inadmissibility ground?
- a. **ASISTA Practice Pointers:** VSC didn't answer this (went off on next question) but our suggestion is that you ALWAYS make some argument about national or public interest, since both the statute and regulations require this. It can be very simple, such as "my client was afraid to access the criminal system because she was undocumented, and this is why Congress passed the law, so it's in the public interest to waive this ground of inadmissibility, which is 212(a)(6)(A)"

You should also explicitly list the statutory grounds you are asking to have waived, so that if and when your client goes abroad, DOS can see that any inadmissibility they notice has been waived. Otherwise, your clients may be stopped by DOS or CBP and required to ask for a more explicit waiver.

10. Why did my U visa applicant get a public charge RFE?
- a. **VSC Answer:** That issue has been addressed; adjudicators should not be issuing public charge issues as a basis for an RFE. Contact the VSC Hotline if this occurs in your case and cite this teleconference.
- b. **ASISTA Practice Pointers:** Even if public charge applies, it should be easily overcome by the (d)(14) waiver and the normal public charge analysis of "prospective test." See "Field Guidance on Deportability and Inadmissibility on Public Charge Grounds," 64 Federal Register 101 (May 26, 1999) available at: http://www.justice.gov/eoir/vll/fedreg/1998_1999/fr26my99N.pdf
11. Several practitioners have said that VSC has told them they intend to revoke U visas, but providing neither a reason nor specific evidence for why such revocation is appropriate. It is not possible to rebut without the details of why the agency intends to revoke. Please let us know whether you agree that people have the right to see the evidence against them and the opportunity to rebut it before their status is revoked. If not, please explain the legal basis for not allowing the opportunity to rebut.
- a. **VSC Answer:** The Vermont Service Center (VSC) is unaware of any specific circumstances in which we have indicated that we intend to revoke U status without cause. The regulation states at 8 CFR 214.14(h)(1) that U-1 non-immigrant status will automatically be revoked if the beneficiary of the

approved petition notifies United States Citizenship and Immigration Service (USCIS) that they do not intend to use the visa. Upon notification, VSC will send the alien an automatic Revocation Notice. 8 CFR 214.14(h)(2) identifies the grounds by which U status can be revoked upon notice. These grounds include the withdrawal of the law enforcement certification by the certifying official; where the approval was found to be in error; where there was fraud in the petition; and, in the case of derivative beneficiaries, where the qualifying relationship has terminated or where the principal petitioner's U status was revoked. In these circumstances, where VSC finds that revocation may be warranted, VSC will send the petitioner, through their attorney of record, a Notice of Intent to Revoke (NOIR). The NOIR will include a complete discussion of the evidence and provide the petitioner 33 days to submit evidence which would overcome VSC's finding that revocation is warranted. In circumstances where the petition is revoked, the petitioner may appeal VSC's decision to the AAO within 33 days.

- b. **ASISTA Practice Pointers:** Please send ASISTA examples where the process outlined above was not followed, so that we may bring them to the attention of VSC.⁵
12. We asked at the meeting if there were a way VSC can communicate with EOIR about pending cases, so judges would grant continuances. VSC said they would think about it, so we will follow up with them on this. If you have cases needing such affirmation, please contact ASISTA or AILA and reference this document.⁶
13. Is the Intensive Supervision Appearance Program (ISAP), e.g. such as ankle bracelets as an alternative to detention, a basis for getting a case expedited?
- a. **VSC Answer:** It can be, but must come from ICE.
 - b. **ASISTA Practice Pointers:** See attached document on "expedite criteria" which is not specific to victim cases. If you are having trouble with your ICE officers requesting prima facie decisions, go up the chain of command, and then let us know so we can raise it with ICE HQ.

B. Travel Issues

14. CBP stated they will start issuing I-94s electronically. How will this affect VSC?

⁵ Contact ASISTA through our questions email = questions@asistahelp.org.

⁶ See above.

- a. **VSC Answer:** Right now VSC does not have any guidance on this issue and the matter is still under discussion.
 - b. **ASISTA Practice Pointers:** We realize that the issuance of I-94 electronically can have an effect on client's applications, especially the issuance of EADs. We will work with AILA on following this issue and notify the field if there are any developments. We have raised this potential problem with DOS and they are aware of the issue. In the mean time, let us know about problems you encounter flowing from this transition.⁷
15. Do U visa holders need advance parole to travel?
- a. **VSC Answer:** U visa holders don't need advance parole because they can come in on U visa, but may need I-192 inadmissibility waiver if they trigger unlawful presence when they travel.
 - b. **ASISTA Practice Pointers:** If clients want to travel abroad, remember there is no "pre-waiver" of unlawful presence (UP), see INA sec. 212(a)(9)(B), requiring accrual of unlawful presence followed by leaving the US. If they have triggered UP in the past and gotten a waiver, you should not need a new waiver. If they will trigger it for the first time when they leave, however, they will need a new waiver. Fill out the new I-192 waiver for clients with their original signatures before they leave the US, so getting it from them once they have left will be very difficult. Once the client has left triggering unlawful presence, send a packet to VSC and, once you know they have received the packet, notify the U hotline that you need a swift waiver approval. The packet should include the VSC receipt notice, a declaration explaining the departure, proof of departure (airline receipts, passport stamp, photos of client with date stamp in front of US embassy abroad, etc.) and the new I-192. Once VSC approves it, remember you must arrange for your client's consular processing within 90 days to avoid adjustment ineligibility.

Advise your clients of the risks of traveling: If they leave before the U is approved, they cannot get back in legally except by processing their U visa (if they come in with a visitor's visa, they may endanger their U status). If they leave after approval and stay beyond 90 days, they will be ineligible to adjust. If they come back in some other way (e.g., by committing visa fraud or

⁷ Contact ASISTA through our questions email = questions@asistahelp.org.

without inspection), they may make themselves ineligible for any kind of status and/or trigger reinstatement of removal (see INA sec. 241(a)(5)).

16. How does one request expedited processing on U cases for consular processing?
- a. **VSC Answer:** Advocates should contact DOS for this inquiry. VSC does not have control over this issue.
 - b. **ASISTA Practice Pointers:** Scott Whelan at CIS Headquarters has been very helpful in resolving U visa problems abroad. Contact ASISTA or AILA for information on how to reach him. For more information on DOS and the practice at particular consulates, contact Jessica Farb jessicafarbuvisa@gmail.com at ICWC for access to the consular processing Google Document.
17. I have a situation where I got an extension to get fingerprints abroad, but they are still delayed. How should I proceed?
- a. **VSC Answer:** VSC does not have control over consular processing issue. If we gave you one extension, whether we give another depends on the situation.
 - b. **ASISTA Practice Pointers:** Inform VSC immediately of the need to extend the deadline with an explanation of why in writing. This will help if VSC denies for abandonment and you need to move for a reconsideration of their denial. You should add reasons for the extension in memo, e.g., humanitarian reasons, which should apply here. As noted above, Scott Whelan at CIS HQ is very helpful in resolving problems with consulates abroad.

C. Derivatives

18. Is there an update on U visa derivative guidance?
- a. **VSC Answer:** Guidance is currently pending with HQ; as soon they get clearance, it will be published on USCIS website with time for public comment.
 - b. **ASISTA Practice Pointers:** In general, the way to keep these cases alive pending guidance is to file I-539 requests for extension for all those affected. These requests may not be granted, but they should not be denied but, instead, held pending the guidance. (So if you get a denial, let the hotline and ASISTA know.)

Remember that principals with derivatives who never got U status MUST extend their own status rather than adjust; adjusting will preclude their derivatives from getting U status and, presumably, the derivatives (having aged out) are not eligible to adjust along with the principal.

Specific Classes

- U-3s who turned 21 while case pending: file extension and EAD requests under 274a.12(c)(14); you should get deferred action and work authorization based on deferred action.
- U-3s in status, about to expire due to age out (turn 21) before accruing 3 years, file the I-539 with I-765 work authorization request under 8 CFR 274a.12(a)(20). You may be denied work authorization once the derivative turns 21, but they should hold the 539 pending guidance.
- Us whose status ended at 21; file 539 to keep case in the queue. You should NOT be denied but current policy is not to grant, so you are creating a record that your client wants to be approved when the guidance fixes the underlying problem.
- U-3s who have accrued 3 years in status, immediately file for adjustment of status.
- U-3s stuck abroad: U-1 principals file I-539 extensions based on need to keep their case open so derivatives stuck abroad don't lose option for status. You may also wish to file 539s for the U-3s abroad, though VSC will probably not grant, just hold.

If you have U principals who have adjusted, thereby eliminating status for derivatives, contact ASISTA or AILA for help brainstorming resolution (e.g, asking CIS to reopen pending guidance).

19. Who is being granted deferred action status?

- a. **VSC Answer:** If derivative children turn 21 while the principal's application is pending, then they will be granted deferred action status provided that they are in the United States and not in removal proceedings, the principal U visa application is approved, and VSC indicated they would "check" inadmissibility. Notify VSC via the hotline of any cases not following this

policy, e.g., where U-3 derivatives were *not* given deferred action when the U-1 application was pending.

- b. **ASISTA Practice Pointers:** See above for suggestions on how to handle various U-3 cases affected by the lack of guidance. If you previously filed an I-765 under category (a)(20) for the specific category noted by VSC (turned 21 while pending), email the VAWA unit at hotlinefollowupI918I914.vsc@dhs.gov to request that they change the category code to (c)(14), based on deferred action.

If the U-3 is in removal proceedings, terminate (not just administratively close) proceedings so the VAWA unit can grant deferred action and attendant work authorization. For U-3s in this situation with final orders of removal you should also file an I-246 Request for Stay of Removal along with a request that ICE contact the VAWA unit to expedite the case and issue a Prima Facie Determination, although we are not sure VSC can do it. It never hurts to ask and will make clear this is a priority case for resolution once the guidance comes out.

- 20. How many I-539 extensions for U age-outs has VSC granted?
 - a. **VSC Answer:** There are about 600 cases that VSC is holding awaiting guidance of Us who turned 21 while the case was pending.
- 21. I have a case where a U derivative's Supplement A is pending a long time after U-1 approved-what should we do?
 - a. **VSC Answer:** If the case is outside processing times, contact the VSC to check into it.
 - b. **ASISTA Practice Pointers:** We recommend using the U visa email hotline, rather than the phone system. This creates a better record of your conversations with VSC, which is very useful for follow-up with supervisors. The U and T visa email hotline is: HotlineFollowUpI918I914.VSC@uscis.dhs.gov.

Remember to keep track of any new inadmissibility issues that may occur in long-pending cases and prepare to ask for a new waiver, as necessary.

22. When should we file the I-539 for 20-year-old U-3 derivative?
- a. **VSC Answer:** USCIS recommends filing I-539 **90 days** before termination of their status, but they can file at any time, and VSC will hold it until 90 days out, which is when they are supposed to make the determination per the regulations. If your I-539 applications was returned because it was filed before the 90-day mark, refile the application; they should not be returned.
23. What should advocates do if enter on U-3 visa but soon after status expires?
- a. **VSC Answer:** File I-539 showing exceptional circumstances why it was filed late. VSC will take a look at it when they get guidance.
24. If U-3 gets married, do they lose U-3 status?
- a. **VSC Answer:** Guidance is still pending. You should still file and they will hold the case.
- b. **ASISTA Practice Pointers:** Whenever possible, advise U-3s not to marry until the guidance is out. If you have cases where VSC has revoked due to marriage, let ASISTA or AILA know, so we can raise our concerns with CIS HQ.
25. U visa and DACA question: If a U-3 is pending, but no deferred action or approval, and aged out due to turning 21 with I-539 pending, would filing for DACA affect the U visa application?
- a. **VSC Answer:** VSC is not allowed to answer DACA questions. Look for information on USCIS' website for information about how DACA intersects with other benefits. If you have specific questions, send them to VSC and they will forward them up the chain of command to Headquarters to add information to the website.
- b. **ASISTA Practice Pointers:** See DACA practice advisory on ASISTA's website at www.asistahelp.org. Bottom line: Filing for DACA should not affect pending U applications, but remember to check for DACA eligibility. In addition, the USCIS DACA website says:

Question--Will I be considered to be in unlawful status if I had an application for asylum or cancellation of removal pending before either USCIS or the Executive Office for Immigration Review (EOIR) on June 15, 2012? ANSWER--Yes. If you had an application for asylum or cancellation of removal, or similar relief, pending before either USCIS or EOIR as of June 15, 2012, but had no lawful status, you may request consideration of deferred action for childhood arrivals. <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD#cases>

Although this USCIS Q&A doesn't specifically mention U visas, the principle is the same. Please let ASISTA know if you have any trouble getting DACA for U derivatives who are not in status and otherwise qualify. Similarly, if you later have problems with U status once the guidance is issued, let ASISTA know.⁸

D. U Adjustment

26. How many 929 approvals have there been to date?
- a. **VSC Answer:** About 300
- b. **ASISTA Practice Pointers:** For more information on 929 applications generally, see USCIS Questions and Answers, "Qualifying Family Members of U Beneficiaries May Obtain Lawful Permanent Residence at: http://www.uscis.gov/files/article/I929_fact_sheet.pdf
27. Is VSC still approving U adjustments for individuals with final orders?
- a. **VSC Answer:** This is in discussion within USCIS. VSC is trying to reach out to get administrative orders closed (either through ICE or EOIR) but strongly encourage everyone to get the orders closed prior to filing adjustment.
- b. **ASISTA Practice Pointers:** Right now VSC will be holding U adjustments with prior removal orders pending further guidance (unless the client can show the removal order has been vacated). This is a change in policy, so if you are experiencing problems with ICE joining motions to reopen cases in proceedings to terminate them, let ASISTA or AILA know (we are reporting

⁸ Contact ASISTA through our questions email = questions@asistahelp.org.

such problems to ICE HQ). ICE HQ has said that all ICE officers should be agreeing to reopen after U approval, not waiting until a U has adjusted.

28. Is VSC holding 485 applications based on approved 929 where there is an active EOIR case or is VSC adjudicating them?
 - a. **VSC Answer:** They are holding these cases.
 - b. **ASISTA Practice Pointers:** We are not clear on why they are holding these cases unless it's related to curing final orders, as discussed above. If you have cases that appear to be on hold but do not involve final orders, please let us know.

29. For U visa adjustment application, how does one prove cooperation with a Law Enforcement Agency (LEA)?
 - a. **VSC Answer:** Client may get new Supp B to support case; or get a letter on LEA letterhead; or the LEA can resign and date old Supp B that had been certification.
 - b. **ASISTA Practice Pointers:** See also alternative to recertification at adjustment phase at 8 CFR 245.24(e)(2), stating that an applicant may submit an affidavit to describe his/her efforts in obtaining a new certification or other evidence describing whether or not the applicant received any other request to provide information for the crime. When your client's case is closed, ask for the additional certification at that point, or get something in writing from the certifier that the case is closed and no further helpfulness is required. See discussion of memorializing contact with LEOs at section I.A.2. above.

30. Is VSC requiring medical examinations for U visa adjustment applications?
 - a. **VSC Answer:** Yes. It's not related to public charge reasons, but is related to INA 245 adjustments requirements generally.
 - b. **ASISTA Practice Pointers:** ASISTA disagrees that this is a requirement. Given other issues, this is not a current focus for advocacy, but if it is precluding a client from adjusting status, let us know.

31. How should advocates address inadmissibility issues in I-929s?
- a. **VSC Answer:** Inadmissibility is not an issue at the time 929 is decided, but inadmissible behaviors are considered at I-485 stage.
 - b. **ASISTA Practice Pointers:** The primary issue at U adjustment related to inadmissibility, for both principal and derivative, is the discretion VSC exercises generally in determining adjustment. This is why we generally suggest that derivatives with significant inadmissibility issues apply for U visas themselves if possible, so they are subject to the waiver provisions. Relying purely on discretion at adjustment is a risky strategy. For this reason, we also suggest that principals file new waiver requests after U approval if they accrue new inadmissibility issues before they are eligible to adjust. In addition to avoiding the pure discretion problem, this shows the applicant is not hiding anything. Credibility concerns, once raised in VSC's mind, are extremely difficult to overcome.

If, however, you are dealing with pure discretion and no prior evaluation by VSC of inadmissibility-related problems, we suggest you use an analysis and presentation similar to that you would use for waivers. The regulations provide some detail and you should read them closely (see below). In addition, how would you argue this if you could ask for a (d)(14) waiver? What "good moral character"-type factors can you marshal?

Here are the relevant statutory and regulatory provisions:

"(m) (1) The Secretary of Homeland Security *may* adjust the status."
INA 245(m)(1) (emphasis supplied) and

"(3) Upon approval of adjustment of status under paragraph (1) of an alien described in section 101(a)(15)(U)(i) the Secretary of Homeland Security *may* adjust the status of or issue an immigrant visa to a spouse, a child, or, in the case of an alien child, a parent who did not receive a nonimmigrant visa under section 101(a)(15)(U)(ii) if the Secretary considers the grant of such status or visa necessary to avoid extreme hardship.

Regarding principals and discretion the regulations specifically say:

(11) Evidence relating to discretion. An applicant has the burden of showing that discretion should be exercised in his or her favor. *Although U adjustment applicants are not required to establish that they are admissible, USCIS may*

take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security or terrorism-related concerns.” 8 CFR 245.24(d)(11) (emphasis supplied)

For derivatives, they say:

“(v) Evidence, including a signed statement from the qualifying family member and other supporting documentation, to establish that discretion should be exercised in his or her favor. Although qualifying family members are not required to establish that they are admissible on any of the grounds set forth in section 212(a) of the Act other than on section 212(a)(3)(E) of the Act, *USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application.* Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.” 8 CFR 245.24(h)(1)(v)

II. General Information and Practice Pointers from CIS

1. Can VSC produce duplicate receipt notices?
 - a. **VSC Answer:** No. Unlike approval notices, Vermont cannot produce additional receipt notice if original is lost. It is something they are working on, but has to do with computer systems.
 - b. **ASISTA Practice Pointers-** Consider scanning receipt notices into PDFs and storing electronic copies of all receipt notices, approval notices, and copies of EADs.
2. It is often difficult to get information on a case from emailing the hotline. Advocates often have to submit multiple inquiries.
 - a. **VSC Answer:** If you've had this problem, email the hotline (again), saying the question was raised in this teleconference forum; include prior emails if possible, or provide what information you can on them. They keep a log of all email hotline requests.
3. If you are having problems with EADs not showing up in the social security system, please send them the examples so they can figure out where the system is breaking down (they think it's a delay in E-Verify, but can't tell without examples)
4. Helpful hints:
 - a. Please provide all signatures in BLUE ink; black ink looks like a photocopy.
 - b. All documents must have original signatures.
5. Can we do more than one motion to reopen to VSC?
 - a. **VSC Answer:** Yes, no limit on number but check time deadlines.

III. VAWA Self-Petitions

From Webex for law enforcement:

1. If safe address given, then all correspondence will go to SAFE address.

2. Remarriage of VAWA self-petitioner after I-360 approval is fine. If the VAWA applicant gets married prior to approval, then VSC will deny or revoke the application.

- a. **ASISTA Practice Pointers:** The regulations do not yet reflect the change Congress made in 2000 to section 204(h) of the law. Here is the statute, in case you need it to educate local CIS offices or ICE officers:

“(h) The legal termination of a marriage may not be the sole basis for revocation under section 205 of a petition filed under subsection (a)(1)(B)(ii) pursuant to conditions described in subsection (a)(1)(A)(iii)(I). *Remarriage of an alien whose petition was approved* under section 204(a)(1)(B)(ii) or 204(a)(1)(A)(iii) or marriage of an alien described in clause (iv) or (vi) of section 204(a)(1)(A) or in section 204(a)(1)(B)(iii) shall not be the basis for revocation of a petition approval under section 205.” (emphasis supplied)

3. Deferred action helps self-petitioners prevent removal, as well as providing a basis for work authorization.

- a. **ASISTA Practice Pointers:** There are three bases for VAWA-specific employment authorization:

If filing a VAWA one-step petition (I-485 with I-360), applicants are eligible work authorization under 274a.12(c)(9) (immediately eligible to adjust). **Remember** that VAWA self-petitioners can transfer priority dates from prior family-based applications to their self-petitions, so they may have a current priority date and be immediately eligible to adjust. Aleinikoff, Implementation of Crime Bill Self-Petitioning for Abused or Battered Spouses or Children of U.S. Citizens or Lawful Permanent Residents (April 16, 1996) at 2-3, available on ASISTA Clearinghouse website, VAWA section http://www.asistahelp.org/documents/filelibrary/documents/Aleinikoff_41696_1B42EBEED3605.pdf

Those not immediately eligible to adjust, (e.g. if application based on LPR abuser) may only receive work authorization once VSC approved the self-petition, at which there are two possible bases: 8 CFR 274a.12(c)(31) or 274a.12(c)(14). The latter is based on deferred action.

Given the prophylactic effect of deferred action on removal, any self-petitioner with concerns about ICE attempting to remove them or their derivatives should request deferred action. Even if a client renews her work permit based on (c)(31) eligibility as an

approved VAWA self-petitioner, she should still make a request in writing to VSC to extend her deferred action status.

Questions from the field (either over phone or in person):

4. If a VAWA self-petitioner is unable to produce documentation about the viability of a marriage, how does one handle situation where additional documentation is not available?
 - a. **VSC Answer:** Although any credible evidence is standard of proof, VSC still wants the “best evidence” which means (a) primary evidence or explanation why you can’t find it, then (b) secondary evidence or why you can’t find it and then (c) declarations and other creative forms of evidence that might not meet the primary or secondary evidence standards. The person who answered this question for VSC also stressed explaining how the relationship started and provide detail or explain why the detail is missing.
 - b. **ASISTA Practice Pointers:** Although we don’t agree with the specific information the VSC person said they need, you may as well provide it while we sort out the law on good faith marriage with them. We are seeing problems with VAWA RFEs generally, on residence and battery/extreme cruelty, as well as good faith marriage; so let us know if you are getting weird or wrong RFEs (see last point below).⁹

Remember that the any credible evidence standard is the KIND of evidence people can supply NOT their burden of proof. The burden of proof is “preponderance of the evidence.” As VSC has mentioned many times before and reiterated at the meeting, they want to see “systems” evidence, which is primary evidence, if applicants mention they accessed a system in their declaration. If the applicants don’t have it or it’s not helpful, then they should explain that up front in their declarations, so VSC doesn’t come back with an RFE. VSC should not require primary evidence, but they need to know why applicants don’t have it or cannot access it.

If you feel that there is an issue with RFE, contact the VAWA hotline and request supervisory review (if you are an ASISTA member, contact us first to discuss and so we can flag for top level supervisors; if you are AILA member, contact AILA VAWA committee to do the same)

⁹ Contact ASISTA through our questions email = questions@asistahelp.org.

ASISTA and AILA are coordinating a “Good Faith Marriage” RFE collection effort because we believe some adjudicators are inadequately trained on this issue. Please contact us if you have RFEs you think go beyond the law’s requirements.

5. Delays in adjudicating I-360 Self-petitions: What’s contributing to it? What’s being done to address it?

a. **VSC Answer:** Efforts were focused on U visa program. Now have time to shift resources to I-360s in October to knock down backlog.

6. Client has ICE administrative removal order and they are allowing time to file I-360. When I-360 approved, does VSC work with ICE to seek administrative decision?

a. **VSC Answer:** NO, this is VSC’s sole decision. VSC will inform counsel for the case that they have approved the 360 but VSC does not work with ICE to terminate proceedings.

b. **ASISTA Practice Pointers:** Do not rely on VSC to communicate with ICE or the local CIS office. Send the VSC approval as an exhibit with your request for unopposed motion to reopen and terminate proceedings (if that is what your client wants) and provide copies to ICE.

7. What should we do about RFEs seeking arrest records outside the record of conviction?

a. **VSC Answer:** Advocates should contact the hotline about the issue. There are some cases where adjudicators are looking for police records that may help, for instance, show abuse or helpfulness (to benefit the applicant).

After discussion about them doing this to detriment of applicants, e.g., for U inadmissibility crimes or self-petitioning good moral character, they agreed that they should be applying the law on what constitutes a record of conviction.

b. **ASISTA Practice Pointers:** From the in-person discussion that occurred at the meeting, there appears to be a lack of education at the adjudicator level about when they are allowed to look behind the record of

conviction and how they may analyze crimes generally. The upper level supervisors, on the other hand, seemed to understand our points. So this means several things:

As noted above, if it has to do with a basic eligibility requirement and your client mentioned accessing the criminal system, they may be seeking those documents to see what the systems said. It is best if you address why you don't want to supply those documents up front, once you've identified that the client mentions the criminal system in his or her declaration.

To the degree such issues may be detrimental to the application, remember that (a) it is the applicant's burden to show eligibility and (b) credibility is crucial. The applicant's personal declaration must explain and disclose any material facts. For example, if an applicant was arrested and charged with DV but later the charges were dismissed (or sustained), she will be more credible if she explains what happened. This does not, however, mean that she must produce documents outside the scope of the government's legitimate inquiries. This may be a fine line, so please consult with ASISTA or AILA if you have strategy questions. Also remember to include declarations from victim advocates that can clarify why the applicant got entangled with the criminal system and what transpired there. ASISTA's website (both VAWA and U) contains guidance for victim advocates on how to prepare declarations. You may also wish to include literature on why victims of domestic violence are accused of committing crimes, although the more your evidence is specific to your client, the better.

Please share with ASISTA and AILA examples of adjudicators requesting documents beyond the scope of what they are lawfully allowed to require.

8. What is the timeline for adjudicating VAWA RFEs? I had a RFE pending for over a year—emailed VSC and was informed that there was a delay because of shifting priorities? What is that about and what is the timeline going to be?
 - a. **VSC Answer:** Resend inquiry to email hotline.
9. Case pending after response for RFE. Advocate checked case status through hotline and was informed case pending background checks. Who is in charge of background checks and where to follow up?

- a. **VSC Answer:** Without knowing specifics, can't answer it. Please send it to email hotline by A# or receipt number and at what stages in process it is.
- b. **ASISTA Practice Pointer:** These answers illustrate a general point, which is that you should not assume the answers you get from the hotline are correct. As noted above in many places, if you think the hotline is wrong, let ASISTA or AILA know. The supervisors reiterated at the in-person meeting that they rely on us to let them know about systemic problems needing more training.

IV. Other Forms of Relief

A. Conditional Residence Waivers Based on Battery/Extreme Cruelty

- 1. Is VSC doing all I-751 battered spouse waivers in conditional residence cases? Recently had a case where CSC sent to VSC and VSC ended up granting.
 - a. **VSC Answer:** If filed with California, the California Service Center will adjudicate I-751 Battered Spouse Waivers. Vermont Service Center will adjudicate the cases filed with them.
 - b. **ASISTA Practice Pointers:** For information regarding which jurisdiction would apply to a client's case, visit: <http://www.uscis.gov/files/form/i-751instr.pdf>
- 2. If an I-751 is first filed as joint petition, then DV emerges, how do we make sure that the two cases (original 751 and subsequent B/EC waiver) are put together?
 - a. **VSC Answer:** VSC can change the basis for the I-751 petition from a joint petition to a waiver based on divorce. You can amend the original filing by contacting VSC but they will review it, request any additional information and then relocate it to the field office, which is (apparently) what they do with all DV waiver cases. If you request two kinds of waiver, e.g., divorce and DV, VSC will treat it as a DV waiver for safety reasons, using the safe address and then adjudicate the application based on what they have. They may decide on the divorce basis, since that's often easier, though they will maintain the safety precautions for the DV waiver. Although a FOIA would reveal on which basis decision is made, VSC does not have a way to tell people which is the basis for the grant. If there's not enough for either, VSC will issue RFE. They realize that it matters for naturalization (e.g.

folks with DV basis can naturalize in 3 years, whereas others subject to normal 5-year rule); VSC will raise the issue with HQ. ¹⁰

B. Non-Immigrant Visa Derivatives Who Suffer B/EC (from 2005 law)

3. Is there any update on guidance on 2005 VAWA provisions for H-4 visa holders?
 - a. **VSC Answer:** No guidance on this issue as of yet, although many of these cases became U visa applications. But applicants who qualify should still file to get in the system.
 - b. **ASISTA Practice Pointers:** We asked at the meeting what people should file and they suggested filing an I-765 noting the statutory basis. VSC will likely accept the application but will not issue an EAD until guidance is issued. Keep in mind that this provision only allows derivatives of certain nonimmigrant categories (most notably H visas) go request work authorization; there is no path to lawful permanent residence.

Those in this situation may wish to explore alternatives such as U visas, DACA and immigrating through other qualifying family relatives or employers.

¹⁰ VSC referenced the following memo when addressing this question: Donald Nuefeld, Acting Associate Director Domestic Operations. File No HQ-70/6.1.8. "Conditional Permanent Residents and Naturalization Under 319(b) of the Act Revision to Adjudicator's Field Manual Chapter 25 (AFM Update AD09-28) (August 4, 2009).