Questions and Answers

September 2010

USCIS Stakeholder Meeting on VAWA, T and U Visas
Vermont Service Center

Introduction

On September 20, 2010, the USCIS Vermont Service Center hosted a stakeholder teleconference on Violence Against Women Act (VAWA), T and U visa cases. The information below summarizes the questions submitted by stakeholders and the responses provided by USCIS.

Questions and Answers

Q: Does the Vermont Service Center (VSC) have a policy regarding the adjudication of group cases? That is, does the VSC make a point of having one adjudicator handle all of the related cases or, perhaps, the opposite, splitting them up? (This happens with us most frequently with T-visa cases, but it could happen in the U context with multiple victims of the same crime). We have received different requests for evidence (RFEs) in group T cases, and it sometimes seems as if one adjudicator might be familiar with the situation and better able to assess the related applications. One RFE for the same basic scenario might question hardship, victim of a severe form of trafficking, law enforcement cooperation, etc., while another might not question any of it. We try to give group cases a label, so that they could be identified, if the VSC wanted to associate cases (such as "Vail restaurant workers," which is a fictional name).
A: The VSC tries to identify group filings when they are received in order to provide consistent adjudication. However, it is not always known immediately that a group exists until several have been worked independently by officers.

Q: If an individual with a T-1 visa receives advance parole and travels, thereby triggering a 3 or 10-year bar, does that individual need an I-192 to re-enter? 8 C.F.R. § 245.23(c)(3) refers to the fact that no waiver is necessary for unlawful presence (ULP) at the time of adjustment of status (AOS). Perhaps this means, then, that T-1 applicants need an I-192 to forgive bars triggered by travel, but T-1 non-immigrants do not since it will be forgiven at AOS as long as it was connected to the trafficking. Clarification on this issue would be extremely helpful.
A: This specific T-1 applicant would not need to file an I-192 for unlawful presence after traveling outside the US if it could be established that the unlawful presence that occurred was connected to the trafficking. The VSC handles each instance on a case-by-case basis, as it's not always clear that the unlawful presence was connected to the trafficking.

Q: Does traveling home to the country where a T-1 visa holder was trafficked from lead to the denial of AOS based on inability to show extreme hardship? How is VSC treating AOS cases with these facts? (This assumes there is no problem with being out of the country too long, so as not to satisfy the continuous presence element).

A: There is no reason that an AOS application would be denied for failure to establish extreme hardship based solely on an applicant's return travel to his or her home country. VSC understands that travel to the home country is sometimes necessary. Additionally, the extreme hardship criteria established with the grant of the T-1 is based on the hardship that the applicant would suffer if forced to depart the US, and is not always associated with hardship upon return to home country.

Q: Will we receive a notice that clients are waitlisted, or should we just assume they are waitlisted because they haven't received a U visa approval?
A: Cases placed on the waiting list receive a notice of that placement. VSC has been doing this since the cap was reached in July 2010.

Q: How quickly will we be receiving the deferred action notices?
A: Deferred action notices associated with the waiting list are sent with the waiting list notification.

Q: What is the current processing time for deferred action?
A: Deferred action notices associated with the waiting list are sent with the waiting list notification.

Q: When and how (fee, fee waiver) do you suggest filing the I-765 EAD application now that the U cap has been reached? What code should we use on the I-765?
A: Those on the waiting list are placed in deferred action. To obtain work authorization based on this deferred action, the alien should file Form I-765 and indicate the work authorization eligibility category 8 CFR 274a.12(c)(14). Form I-765 can be filed any time after the alien has notification he/she received deferred action based on placement on the waiting list.

Q: Is there any problem with filing Form I-765 along with Form I-918 and requesting deferred action ?
A: There is no method to grant deferred action based simply on the filing of an I-918. These cases are not rejected until a thorough review of the immigrants history is completed however, the individual will be denied if they are not filing the (c)(14) based on a previous grant of deferred action status.

Q: Must principals pay the fee or request a fee waiver even though they don't need an I-765 under the normal process?
A: Yes.

Q: For those who have filed an I-765 already (in cases filed prior to reaching the cap) should practitioners file a new I-765 if the case is waitlisted? Is this the same for derivatives?
A: If your case has been placed on the waiting list you may ask to have a pending I-765 changed to (c)(14).

Q: People seem to be getting deferred action (DA) & EADs for four months, presumably in anticipation of the new visa year beginning in October. However, filing an EAD on DA, which takes about three months to process, would technically give people only about a month of DA if an attorney was able to immediately file the EAD within a few days. Moreover, EADs with such short time frames makes it difficult for clients to get jobs. Could the VAWA Unit provide deferred action for a slightly longer period (more than a few months), so that the amount of time on the deferred action EAD doesn't make the EAD holder look as if she will only be able to work for a few months?
A: Currently, the only new grants of deferred action being issued in association with a U nonimmigrant petition are in conjunction with the waiting list process. Those grants of deferred action were valid from the date the U petition is placed on the waiting list until December 31, 2010.

Q: When the visa numbers become available and the U visas can be issued, how should clients make the transition from the DA-based EADs to the U-approval-based EADs?
A: When the visas become available and those on the waiting list are approved, principals will automatically receive an EAD card under the (a)(19) category. Qualifying family members seeking work authorization will need to file a new Form I-765 under the (a)(20) category.

Q: Please provide the statutory basis for not attributing U visas based on interim relief applications to the year in which interim relief was initially granted. Note that 8 C.F.R. 214.14(c)(6) provides that "Petitioners who were granted U interim relief ... and whose Form I-918 is approved will be accorded U-1 nonimmigrant status as of the date that a request for U interim relief was initially approved."(emphasis supplied). Reflecting this, USCIS counts time in interim relief status towards the three years needed for adjustment.
A: USCIS is reviewing this issue and will provide an update as soon as possible.

Q: Does the conditional grant count toward the three years for adjustment of status eligibility or do the three years not start counting until the person has the actual U visa?
A: The conditional grant does not count towards the accrual of continuous physical presence for adjustment of status. Applicants must have accrued three years continuous physical presence since the date of admission as a U nonimmigrant in order to file for adjustment of status under 245(m).

Q: I have a principal who is including her 20 year old son as a derivative. I plan to file it within the next few weeks. Her son will turn 21 in early November. My understanding from the list serve is that USCIS is denying U visa for derivative children that turn 21 while the petition is pending and before approval. If USCIS doesn't start allocating visas again until October 1, it may be very close for this child. I will submit a request to expedite, but will the eventual grant of the U visa date back to the date of the grant of deferred action?
A: USCIS is currently only denying cases in which the derivative child (who never held interim relief) was over 21 at the time the I-918A was filed on his/her behalf. All those who were under 21 (and never held interim relief) at the time of filing of the I-918A but who aged out while the I-918A was pending are being held pending headquarters guidance.

Q: Should clients that had temporary protected status (TPS) and now have a U visa, re-register for TPS? Or does the U visa supersede the TPS? If, in the future, they lose their U visa status or are unable to adjust, can they then re-register for TPS if they did not re-register when they received their U visa?
A: TPS recipients are eligible to re-register if they choose, even if they have an approved I-918/I-918A, pursuant to 8 CFR 244.2(f)(2)(i), which allows for TPS eligibility to be extended even if the alien is a nonimmigrant. While the approval of the U petition provides a future opportunity to apply for adjustment, it does not cut off his/her access to TPS. The determination of whether the individual should re-register for TPS is up to the individual alien.

Q: We've seen an increase in DNA requests for U visa holders who are consular processing. It almost seems to be routine now at some embassies, including El Salvador. For those derivatives consular processing, has familial relationship already been established? If so, how do we deal with requests for further proof of relationship including letters, pictures and DNA from the embassies?
A: The Department of State has its own policies and protocols for consular processing. Questions regarding those processes and policies should be directed to the Department of State.

Q: Can a procedure be put in place to permit derivatives abroad to get an extension on an RFE for fingerprints taken by a U.S. Consulate? Some consulates have very limited fingerprinting capacity, lack procedures or do fingerprints improperly. Mail delays may impede fingerprint cards getting to derivatives. Derivatives are denied because they failed to get the fingerprints by the RFE deadline. Although VSC has been generous about reopening such cases to accept fingerprints, a more systemic solution might be to allow derivatives to get fingerprints before they get an RFE. Do you have any suggestions for avoiding the fingerprint-delay problem for derivatives abroad?
A: VSC provides two requests for fingerprint submission in all cases and is liberal with reopening a case that was denied due to fingerprints not arriving in a timely manner. Those needing to get prints taken at a consulate should contact the consulate and seek guidance and instructions for the best way to accomplish having prints taken.

Q: It appears that current VSC practice is that, if there was no interim relief in the case, then children have to be approved before turning 21 even if you file before they turn 21 (although we know of cases approved despite age-out subsequent to filing). What is the status of the final guidance addressing this issue?
A: The matter is under discussion at headquarters. VSC has no update at this time.

Q: Are you expediting derivative cases where aging out may make the derivative ineligible if the approval is not granted before he or she turns 21?
A: The matter is under discussion at headquarters. VSC has no update at this time.

Q: What is the statutory basis for granting only to those who remain under 21 until USCIS makes a final determination?
A: The U nonimmigrant regulations require that the relationship between the principal and the qualifying family member must exist at the time the U petition was filed, and must continue to exist at the time of adjudication of the qualifying family member's petition and at the time of the qualifying family member's subsequent admission to the United States. See 8 CFR 214.14(f)(4).

Q: Please review the procedures or instructions for submission of Form I-193 (waiver of passport requirement). According to discussions on the VAWA Experts listserv, it appears there is still much confusion over whether the I-193 should be submitted to VSC, or with the consulate, or with the Kentucky Consular Center (KCC). Would the filing location matter depending on whether the applicant is in the U.S. or abroad? Also, if the I-193 is filed at and granted by VSC, what steps does VSC take to inform the consulate of the approval?
A: Aliens should submit Form I-193 to the VSC. All approvals related to a U nonimmigrant petition, including any waivers of inadmissibility, are now sent to the KCC. This allows consular officers are able to view the approved petitions and any approved waivers of inadmissibility.

Q: We know the I-193 can waive the lack of a passport, but is the I-193 enough for the person to be granted a visa for entry to the U.S.?
A: The Department of State is in charge of consular processing. All questions relating to the issuance of a visa through consular process should be directed to the Department of State.

Q: A U-3 6 year old son in Mexico was approved and cabled, and is awaiting his consular appointment in Mexico City. The client cannot obtain a Mexican passport on behalf of her U-3 son without the consent of the biological father or a court order showing she has legal and physical custody of her son. The child's biological father's whereabouts are unknown. (Biological father is not the same guy as client's

abusive ex-partner.) The child has never been to Delaware, so the family court here has no jurisdiction over custody and will not hear the custody petition. The only other option is her traveling to Mexico to obtain legal and physical custody in the courts there; however, she cannot travel due to disabilities and financial issues. If I file the I-193 travel document, will VSC think I am trying to circumvent custody/Hague rules and deny it?
A: VSC will adjudicate a Form I-193 received as part of a U visa filing. Approval of the I-193 does not necessarily mean the individual will be granted entry into the U.S. Consular processing must take place and all requirements from the Department of State must be satisfied.

Q: We seem to have encountered a dilemma with lawful permanent residents seeking U visas; VSC's position seems to be that only those who have actually lost LPR status are eligible to apply for a U visa. Is USCIS willing to adopt a simpler process? In the meantime, what do you recommend LPRs seeking U visas do while CIS determines a process for them to file safely for a U status?
A: The matter is under discussion at headquarters.

Q: Will VSC consider TPS-like situations, such as Tropical Storm Agatha, as "emergent circumstances" justifying expedited review?
A: VSC will review all requests for expedites and make a determination based on the details of each request.

Q: Are there any U nonimmigrant I-539s awaiting further guidance and, if so, what are the complicating factors requiring more input?
A: There are a series of issues that are under discussion with headquarters ranging from age-out issues to length of extension.

Q: Should I-765s be submitted with (or pursuant to) I-539s to extend U nonimmigrant status? We've submitted many during the last 3-4 months but still have none adjudicated.
A: Form I-765 can be submitted with the Form I-539. The forms will be adjudicated together.

Q: Will the time we are in limbo (presumably meaning time between old, less-than-three-year status running out and being able to file for an extension under the new memo) count toward the three years?
A: This is one of the issues currently under discussion with headquarters.

Q: If an I-539 is approved, will the approval be good for four years or will it be an annual process? The "aggregate" language in the guidance implies you may not grant four year extensions, but some shorter period that adds up to four years.
A: It is not anticipated that multiple I-539s will need to be filed to attain sufficient time in status to file for adjustment.

Q: When is guidance on medical exams for U adjustments expected?
A: HQ has recently agreed that the medical exam is required. We will be receiving something in writing very soon and will reissue RFEs for those cases that we have been holding.

Q: We have heard that some I-929 applicants have been approved and some have been told VSC is waiting for "guidance from headquarters." What are the distinguishing factors between I-929s VSC can adjudicate now and those requiring guidance beyond the adjustment regulations?
A: The age out issue also affects some of the I-929s. At this time we are beginning to work those that are not affected by this issue.

Q: Do I-929 beneficiaries have to prove admissibility when they adjust? If inadmissibility factors exist, and assuming they will be considered in the exercise of discretion, should applicants make arguments about the public/national interest, as they would if they were requesting a waiver? Are there other equities you are looking for in your discretionary determinations on U derivative adjustments who were not vetted at the U visa phase?
A: Establishing admissibility is not a requirement for adjustment. However, applicants will need to establish that USCIS should favorably exercise discretion and grant AOS. If applicants have inadmissibility factors or anything else that they believe may prevent a favorable exercise of discretion, applicants should submit sufficient documentation to offset these adverse factors and establish mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate.

Q: The regulations and instructions for adjustment of status based on U nonimmigrant status require that a U derivative not unreasonably refuse to provide assistance to law enforcement. In practice, this requirement has led to confusion because some derivatives possess information on the crime and have been asked to assist law enforcement, but many do not. For those who have never been asked to assist (e.g. if the derivative was not in the United States when the crime was committed) how may they satisfy this element for purposes of their adjustment application?
A: If applicable, derivative applicants can provide a statement indicating that they have not been asked for assistance from law enforcement, but would not unreasonably refuse to provide assistance if asked.

Q: To what extent, if at all, are the derivatives tied to the principal's continued cooperation at the adjustment stage?
A: Derivatives are considered a separate adjustment and are not dependent on the adjustment of the principal U1. However, if USCIS determines that the U1 did not continue to cooperate with law enforcement after the grant of status, or refused a reasonable request for assistance, the approval of the I-918 may be reviewed for revocation. If a U1 petition is revoked, a notice of intent to revoke would be issued for all approved derivatives.

Q: Does VSC have any more specific guidance than what is provided in the U adjustment of status regulations on showing extreme hardship for the I-929 family members? The factors listed in the regulations seem to indicate that the relevant hardship is to the U-based permanent resident if s/he were forced to leave the US to be with the (denied) relative. Recognizing, of course, that these determinations are made on a case by case basis, is it possible to isolate the most important factors?
A: The regulation requires evidence establishing that either the qualifying family member or the principal alien would suffer extreme hardship. See 8 CFR 245.24(h)(1)(iv). The VSC does not have any more specific guidance than what is currently in the regulation. Family unity appears to be the most common factor presented by petitioners at this time. Petitioners are encouraged to submit as much documentation as possible to establish this eligibility requirement. In addition, regulation (8 CFR 245.24(g)(3)) specifically requires that the petition be accompanied by a statement from the qualifying family member to establish that discretion should be favorably exercised.

Q: A's new husband, B, is providing essential emotional and financial support to A for her recovery from domestic abuse. If B's I-929 is denied, and A stays in the US with her child, she will suffer without the support she's come to depend on. The abuser on which her U approval was based is now living in the home country, so it is not safe for A to return there. What type of documentation does she need to show to demonstrate hardship, if she provides detail? Does B need to show hardship to himself as well?

A: The regulation states that the hardship can be to either the principal or the qualifying family member. B does not necessarily need to show hardship, but does need to provide a statement to request the favorable exercise of discretion.

Q: C got a U based visa on a felony assault during which he was shot. If his new wife, D, who is filing the I-929, is returned to the home country, C will return with her because he can't live without her. They come from an area plagued by gangs and drug cartels, where gunfire is frequent and would traumatize C because of his experience in the felony assault. Is this sufficient hardship? Should he describe the hardship of living without D, as well as the trauma of living in a place that reminds him of his assault on a daily basis? Does D also have to show hardship?
A: Please see answer above – the regulations state that the hardship can be to either the principal or the qualifying family member. We can not speak to specific cases at this time. We encourage each petitioner to submit as much evidence as possible to establish the extreme hardship requirement.

Q: Form I-918 expired as of 8/31/2010 but the new form is not yet available. Will VSC be accepting expired forms for a while?
A: The revised Form I-918, with an expiration date 7/31/2012, is available on www.uscis.gov. VSC is currently still accepting the form with the expiration date of 8/31/2010.

Q: Should we say yes or no if the client has not been asked for further assistance?
A: The suggestion for altering the wording of the question will be forwarded for discussion. Note: The certification should be completed by the certifying official.

Q: Is robbery/armed or not, a felonious assault if the victim is harmed in some way and the law enforcement agency signs off on the I-918?
A: This determination is made on a case-by-case basis and depends on the wording of the essential elements of the codified crime and the other evidence provided in the record.

Q: If in this case the LEO certified that they investigated felony assault, would CIS treat that at face value or investigate further? In what cases does CIS investigate further, e.g., look behind the LEO certification, either on whether the crime fits the designated category or whether the applicant was helpful?
A: It depends on the evidence provided by the certifying official on the certification and what other evidence is provided by the petition or may be in the petitioner's file.

Q: Could felony robbery be considered in the felony assault "category" of crimes depending on the facts (as, for instance, stalking can fall under the domestic violence category if the facts support it), and/or if the elements of the state felony robbery statute contains the elements of state felony assault?
A: This determination is made on a case-by-case basis and depends on the wording of the essential elements of the codified crime. In some instances, robbery can be viewed a felonious assault.

Q: We have seen a denial in a case where the applicant fit the definition of "child" on the day before she turned 21, as required by the statute, but was denied because she later married. Please provide the statutory basis for this denial, if this is CIS policy. We note that the statute specifically uses the word "individual" not "child" to define eligibility beyond the day-before-21 requirement. (See Attachment for full argument previously shared with CIS).
A: The matter is under discussion at headquarters. VSC has no update at this time.

Q: Apparently VSC's position is that, while a self-petitioner can assume the priority date of a previously

filed I-130 on her behalf, a child included as a derivative in that original 360 can not assume the priority date on the 360 for a new, independently filed 360 on behalf of the child. This makes no sense to us, legally or policy-wise, given Congress' special exceptions to the normal family-based rules for derivatives (e.g., INA § 204(a)(1)(D) and CSPA generally). What is the legal rationale for this distinction? Example: "I asked VSC via the hotline awhile back and was told "they don't do that--they can only credit a priority date (PD) from an I-130 filed on the child's behalf by the abusive LPR/USC parent NOT a PD from the mother's I-360 (even if the child who is now an approved self-petitioner in his own right was a derivative on the mother's I-360)"
A: VSC follows the regulation of 8 CFR 204.2(h)(2), which states in pertinent part: …A self-petitioner who has been the beneficiary of a visa petition filed by the abuser to accord the self-petitioner immigrant classification as his or her spouse or child, however, will be allowed to transfer the visa petition's priority date to the self-petition. The visa petition's priority date may be assigned to the self-petition without regard to the current validity of the visa petition. If the child could have been accorded that older priority date because the abuser filed an immigrant petition on his/her behalf as well, the child may benefit from that older priority date.

Q: When will VAWA adjustments start being adjudicated at VSC? We have received several transfer notices of VAWA adjustments that were granted here in Salt Lake, but now are being transferred to VSC. Does this have anything to do with the adjudication of VAWA adjustments at VSC?
A: The matter is under discussion at headquarters. VSC has no update on this issue at this time.

Q: Where should people file 601 waivers? The form now indicates VSC has jurisdiction over 601s for VAWA self-petitioners. If VSC can do 601s, could they also do I-212s for those cases requiring both a 601 for 212(a)(9)(C) and an I-212 for the prior removal? The 2009 reinstatement memo acknowledges that self-petitioners may be able to overcome 212(a)(9)(C), normally a prohibitive barrier for those seeking to avoid reinstatement under 241(a)(5), and thus may be eligible for an I-212, but we are not sure where people should file these documents.
A: In accordance with the form directions, I-601 waivers can be submitted to the VSC. In most cases they are adjudicated at the District Office in conjunction with the I-485 adjustment adjudication.

Q: Practitioners are still experiencing problems with adjudication of 751s battery/extreme cruelty waivers at the service centers (. We understand that recently CIS has instituted a quality control system for field offices in their handling of cases involving domestic violence (e.g., VAWA self-petitions & adjustment; battery/extreme cruelty 751 waivers). Please describe this system and how practitioners can access it to fix local problems.
A: There is still ongoing discussion on how to bring those issues and concerns to the attention of management at the Field Offices. Once we have that information in place we will share with stakeholders and advocates.

Q: Are U visa holders applying for adjustment of status required to submit Form I-693?
A: Section 245(m) of the Immigration and Nationality Act provides that adjustment of status is a discretionary benefit. Adjustment applicants therefore have the burden of showing that USCIS should exercise favorable discretion in favor of the applicant. Although U adjustment applicants are not required to establish that they are admissible under public health and most other grounds of admissibility, USCIS may take into account all factors, including any adverse factors, in determining whether a favorable exercise of discretion is appropriate. This may include, but is not limited to, health related issues that may potentially have a negative impact on U.S. public health and safety. Therefore, due to broader public health implications, USCIS has determined that our policy is to require U adjustment applicants to submit a Form I-693, Report of Medical Examination and Vaccination Record. When determining whether or

not a favorable exercise of discretion is appropriate, USCIS may consider an adjustment applicant's failure to provide a Form I-693 as a negative discretionary factor.