

Chapter 8

Protection-Based Relief: Forging a Path to Permanent Status

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The authors thank Kara Rieke and Volunteer Lawyers Network for consulting about best practices in custody proceedings in state courts.

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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).

A. Asylum Eligibility Requirements

In order to qualify for asylum, the client must be in the U.S. (or at a U.S. border) and have a well-founded fear of persecution in the client's country of nationality or last habitual residence on account of their race, religion, nationality, membership in a particular social group, or political opinion. INA § 208(b)(1)(A).



CAVEAT

The number of refugees that the United States will agree to admit each year is decided by the President in consultation with Congress. INA § 207(a)(2). The Trump Administration has reduced the number of refugees admitted to the United States each year since taking office. See Presidential Memorandum, *Presidential Determination on Refugee Admissions for Fiscal Year 2021* (Oct. 27, 2020), available at www.whitehouse.gov/presidential-actions/presidential-determination-refugee-admissions-fiscal-year-2021/; Michael D. Shear and Zolan Kano-Youngs, *Trump Slashes Refugee Cap to 18,000, Curtailing U.S. Role as Haven*, N.Y. TIMES, Sept. 26, 2019, available at www.nytimes.com/2019/09/26/us/politics/trump-refugees.html (describing how the administration not only halved the refugee cap from last year's numbers, but also has restricted refugees admitted to a few very specific categories that further restricts access to refugee protection to broad groups of individuals who may seek protection from persecution). However, the cap on refugee admissions does not impact the number of individuals who can receive asylum. Unlike refugees, there is no cap on the number of individuals who can be granted asylum in the United States.

1. Persecution

Neither the Immigration and Nationality Act (INA) nor accompanying regulations define persecution. The Board of Immigration Appeals (BIA) and federal circuit courts have broadly defined “persecution” as a “threat to the life or freedom of, or the infliction of suffering or harm upon, those who differ in a way regarded as offensive.” *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). Another definition is “the infliction or threat of death, torture, or injury to one’s person or freedom” on account of one of the five statutory grounds (race, religion, nationality, political opinion, and social group). *Ngure v. Ashcroft*, 367 F.3d 975, 990 (8th Cir. 2004). Physical abuse that poses a threat to life or freedom can generally constitute persecution. See, e.g., *Bracic v. Holder*, 603 F.3d 1027, 1035–36 (8th Cir. 2010) (overturning an IJ’s holding that past persecution was not present, holding that any reasonable fact finder would find persecution had occurred where an asylum applicant was beaten until he lost consciousness on one occasion). Discrimination, low level harassment, and intimidation are generally not considered to rise to the level of persecution; however, a series of incidents which individually might not meet the standard could meet the standard when considered in the aggregate. *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23, 26 (BIA 1998). Economic harms may also be considered persecution if they constitute a threat to life or freedom. *Mirisawo v. Holder*, 599 F.3d 391 (4th Cir. 2010). Death threats are a form of persecution. *Sholla v. Gonzales*, 492 F.3d 946, 952 (8th Cir. 2007) (“this country’s asylum statute would be quite hollow indeed if our definition of persecution required Sholla to wait for his persecutors to finally carry out their death threats before Sholla could seek refuge here. Our accepted definition of persecution is far less demanding, and the numerous [death threats] that Sholla describes fall squarely within it”). “Threats

alone constitute persecution . . . when the threats are so menacing as to cause significant actual suffering or harm.” *La v. Holder*, 701 F.3d 566, 571 (8th Cir. 2012).

2. Government and Non-Government Persecutors

In order to qualify for asylum, the agent of persecution must either be the government or a non-government agent that the government either cannot or will not control. Non-government agents may include groups such as paramilitary forces or organized crime groups. They may also include families, clans, or society-at-large.

Numerous BIA and Eighth Circuit cases containing helpful analysis demonstrating that an applicant persecuted by a private group or individual may demonstrate their eligibility for asylum based on the government’s inability and/or unwillingness to protect the applicant from that private actor persecutor. Below, the authors have included just a few prominent examples, but many more cases from both the BIA and the circuit court are available recognizing this point.

In *Gathungu v. Holder*, 725 F.3d 900 (8th Cir. 2013), the court found that the Kenyan government was unable or unwilling to control the Mungiki group, where the record contained numerous reports detailing the murders of defectors and formation of Mungiki death squads. Reports also suggested the Kenyan government was complicit in attacks by Mungiki, and that the Kenyan police force was widely corrupt, with some members bribed by Mungiki or were Mungiki members themselves.

In *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007), the Eighth Circuit found that a Somali applicant who feared being subjected to female genital mutilation by members of her clan had met her burden of proof to show eligibility for asylum.

In *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), the BIA found that a young woman, a member of the Tchamba-Kunsuntu Tribe of northern Togo who resisted forced female genital mutilation and forced marriage from members of her community, qualified for asylum. The applicant was forced by her family into a polygamous marriage that required her to undergo severe genital mutilation before the marriage could be consummated. According to her testimony, upon return to Togo, the police would return her to her husband, a prominent member of the police. Upon examining evidence in the case, including reports regarding country conditions, the court found that in Togo, women remain without effective legal recourse “and may face threats to their freedom, threats or acts of physical violence, or social ostracization for refusing to undergo this harmful traditional practice.” *Kasinga*, 21 I&N Dec. at 361–62. In so holding, the BIA emphasized the Togo President’s poor human rights record and that government forces have been known to engage in human rights abuses.

In re S-A-, 22 I&N Dec. 1328 (BIA 2000) is one example of the clear provision from both the BIA and numerous circuit courts that an applicant may succeed in showing lack of government protection if the applicant can demonstrate that seeking government protection would be futile, under the facts and circumstances of the particular case. In the *S-A-* decision, the BIA considered the specific facts of the case to determine whether reasonable protection was available to the applicant. In this case, a young Muslim woman in Morocco consistently experienced physical and emotional abuse from her father, who followed strict Islamic beliefs. The young woman, however, adhered to far more liberal beliefs. Although the young woman never sought protection from the police, the court found that in the Moroccan society such efforts would have proven futile and even dangerous. The court considered various reports on the country conditions that demonstrated the law in Morocco was skewed against women and violence against women was commonplace without legal remedies available to survivors.

In the BIA decision *Matter of O-Z- & I-Z-*, 22 I&N Dec. 23 (BIA 1998), the court found that the applicant had showed that the government was unable or unwilling to control his anti-Semite persecutors, even though the government’s official position condemned anti-Semitism. In this case, a Jewish resident of Ukraine was repeatedly subjected to physical assaults, vandalism to his property, and humiliation of his son at school by Ukrainian nationalists. Counsel for the DHS argued that the violence was not government-directed or condoned and that country conditions demonstrated that anti-Semitism ceased to be a government policy. Both the immigration judge and the BIA on appeal found to the contrary. They noted that the police in Ukraine did nothing to assist the persecuted individual beyond filing a report. The BIA also gave significant weight to the evidence of country conditions demonstrating that local officials take no action against those who foment ethnic hatred. The BIA made its findings despite reports that the Ukrainian government was officially speaking out against anti-Semitism. Based on the country conditions in the record, as well as the experience of the particular applicant, the BIA found that the government had failed to rebut the presumption of a well-founded fear or persecution based on prior persecution suffered by the asylum seeker.

Matter of K-S-E-, 27 I&N Dec. 818, 823 (BIA 2020) contains unhelpful analysis of firm resettlement, but does reaffirm the standard governing inability and unwillingness to control the persecutor as permitting applicants to show that a non-government individual or entity could have persecuted the applicant. The decision states that “[s]ince the respondent fears private actors, he must establish that the Government is unable or unwilling to control them.” *Matter of K-S-E-*, 27 I&N Dec. at 823. The decision acknowledges that the respondent could have shown lack of government protection either by showing that the government was unable or unwilling to control his persecutor, or that it would have been futile to report the crime to the government. *Id.* Although the Board found the record presented by the applicant in *K-S-E-* insufficient to show lack of government protection, it is important that the BIA correctly reaffirms the standard governing inability/unwillingness to control a private actor, given the confusion created by 2018 Attorney General decision *Matter of A-B-*, discussed further below.

A 2018 decision by the Attorney General caused confusion regarding the analysis of the “government control” aspect of the refugee definition, stating in the dicta of the *Matter of A-B-* decision that an applicant “seeking to establish persecution based on violent conduct of a private actor must show more than difficulty . . . controlling private behavior. . . . The applicant must show that the government condoned the private actions or at least demonstrated a complete helplessness to protect the victims.” *Matter of A-B-*, 27 I&N Dec. 316, 337 (A.G. 2018) (internal citations omitted). Yet, the case the Attorney General relied upon in using the above “complete helplessness” language—*Galina v. I.N.S.*, 213 F.3d 955, 958 (7th Cir. 2001)—suggests that the language in the dicta in *Matter of A-B-* is nothing more than an inartful articulation of the correct standard. Other cases the Attorney General relied upon support a less onerous standard. For example, on rehearing of *Hor v. Gonzales*, 400 F.3d 482 (7th Cir. 2005), the court held that the applicant met the standard despite the fact that the police intervened several times, suggesting that despite the use of the “complete helplessness” language in that decision, the government inability/unwillingness to control standard can be met even where the police have intervened. *See Hor v. Gonzales*, 421 F.3d 497, 502 (7th Cir. 2005).

The AG opinion in dicta is inconsistent with decades of circuit court and BIA case law. *See, e.g., Gathungu v. Holder*, 725 F.3d 900, 908–09 (8th Cir. 2013) (finding sufficient evidence that the government of Kenya was unable or unwilling to control the Mungiki criminal group, where there was evidence that the government was complicit in various attacks by Mungiki and where the record contained evidence that the Kenyan police force is widely corrupt); *Edionseri v. Sessions*, 860 F.3d 1101, 1104–05 (8th Cir. 2017); *Matter of McMullen*, 17 I&N Dec. 542, 544 (BIA 1980); *Matter of Pierre*, 15 I&N Dec. 461, 462 (BIA 1975). The Eighth Circuit appears to continue to read *Matter of A-B-* narrowly as overturning prior BIA decision *Matter of A-R-C-G-* and continues to apply the “unable and unwilling to control” standard. *See, e.g., Juarez-Coronado v. Barr*, 919 F.3d 1085, 1088–89 (8th Cir. 2019) (indicating that to qualify for asylum, an applicant must demonstrate that persecution was “inflicted by a country’s government or by people or groups that the government is unable or unwilling to control,” and that “the government’s

ability to control the persecutors is a question of fact” and not stating that the government must condone violence or be completely helpless to prevent it). Interpretations from various DHS branches appear consistent with the Eighth Circuit’s reading. For instance, the Office of the Principal Legal Advisor for ICE, in a Memorandum to all ICE attorneys regarding interpretation of the *Matter of A-B-* decision (hereinafter, “OPLA Memo”), indicated that the impact “of primary importance” of *Matter of A-B-* was to overrule the BIA’s decision in *Matter of A-R-C-G-*. Tracy Short, Memorandum: Litigating Domestic Violence Based Persecution Claims after *Matter of A-B-* (July 11, 2018) (memorandum on file with Deskbook chapter authors). The OPLA Memo notes that the principal impact of the decision is to eliminate the protected group previously recognized in *Matter of A-R-C-G-* as affording protection to certain domestic violence survivors seeking asylum. *Id.* However, the OPLA Memo does not suggest at any point that the decision establishes a heightened standard regarding government protection. The OPLA Memo also notes that the Attorney General “did not conclude that particular social groups based on status as a victim of private violence could never be cognizable.” *Id.* USCIS, in its initial guidance to asylum officers following the decision, referred asylum officers to the Immigration and Customs Enforcement (ICE) Office of the Principal Legal Advisor (OPLA) for questions regarding the proper application of the decision. *Id.* Following the D.C. Circuit’s decision in *Grace v. Whitaker*, 344 F. Supp. 3d 96, 106 (D.D.C. 2018) addressing the application of *Matter of A-B-* in the context of credible fear and reasonable fear interviews, USCIS issued new guidance to asylum officers requiring them to follow *Grace*’s guidance in their adjudication of applications for asylum and related relief.



COMMENT

Although the *Grace* decision abrogated aspects of *Matter of A-B-* as the decision is applied in the context of credible fear interviews, the policy memorandum issued by USCIS following the *Grace* decision is explicitly directed at all asylum officers. See John Lafferty, *Today’s US DC District Court Decision in Grace v. Whitaker and Impact on CF Processing* (Dec. 19, 2019), available at <www.aclu.org/legal-document/grace-v-whitaker-uscis-guidance-re-grace-injunction>.

The *Grace* decision provides helpful, well-reasoned guidance regarding the unable/unwilling standard following *Matter of A-B-* that is binding on asylum officers and persuasive authority for immigration judges. “Congress was clear that its intent in promulgating the Refugee Act was to bring the United States’ domestic laws in line with the [United Nations Protocol Relating to the Status of Refugees].” *Grace*, 344 F. Supp. 3d at 06.



COMMENT

In a decision issued on January 25, 2019, the D.C. District Court denied the government’s request for a stay of the decision in *Grace* pending its review of the government’s appeal from the decision. See *Grace v. Whitaker*, Civ. No. 18-1853, 2019 WL 329572 (D.D.C. Jan. 25, 2019). In July 2020, *Grace v. Whitaker* was affirmed in part, vacated in part, and remanded to the district court. *Grace v. Barr*, 965 F.3d 883 (D.C. Cir. 2020). Among the key findings is that the “condoned or completely-helpless standard” cannot replace the “unable or unwilling to control” standard in determining whether persecution by non-state-actors qualifies.

Because Congress demonstrated in promulgating the Refugee Act its intent to bring U.S. law into compliance with the United States' treaty obligations under the UN's Refugee Convention, the *Grace* court reasoned that the UN's guidance interpreting the "unable and unwilling" standard is helpful guidance in understanding congressional intent. *Grace*, 344 F. Supp. 3d at 128. The court cited to the UN's *Handbook on Procedures and Guidelines for Determining Refugee Status and Guidelines on International Protection*, in which the UNHCR explains that "persecution included 'serious discriminatory or other offensive acts ... committed by the local populace ... if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer *effective* protection.'" See UNHCR Handbook ¶ 65 (emphasis added)." *Id.* Based on this interpretive guidance, the court concluded that the "unable and unwilling" definition was not ambiguous and, thus, the AG's interpretation of the statute in *Grace* was not entitled to the *Chevron* deference typically afforded reasonable federal agency interpretations of ambiguous statutes impacting procedures before that agency. *Id.* Second, the court also commented that the AG's citation to circuit court case law in support of his proposed heightened standard is inapposite. The court pointed out that, in the small handful of cases that used the "condoning or complete helplessness" language, the circuit court ultimately found inadequate government protection, suggesting that the language was not meant to articulate a heightened government protection standard beyond that laid out in the language of the statute, but rather was used to illustrate a specific point in particular cases. *Id.* at 129.

Furthermore, any application of heightened standard of unable/unwilling analysis would likely be inconsistent with congressional intent, given the plain language of the refugee definition and statutes governing other, more restricted forms of humanitarian relief from removal. For instance, this is demonstrated by comparing the language of the refugee definition and the Convention Against Torture (CAT). Under the CAT, an applicant must show that the government would consent to or acquiesce in the torture, a standard acknowledged to be higher than the standard for establishing a right to asylum. See 8 C.F.R. § 208.18(a)(1). See also, e.g., *Fuentes-Erazo v. Sessions*, 848 F.3d 847, 852 (8th Cir. 2017) (describing standard for showing entitlement to relief under CAT as "more onerous" than that for asylum). Yet even under the CAT, an applicant can show entitlement to relief where the government has made some effort to respond to the torture, i.e., not complete helplessness. See, e.g., *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1139 (7th Cir. 2015).

3. Well-Founded Fear

In order to establish a well-founded fear of persecution, the applicant must establish that there is a reasonable possibility that the client would be persecuted. The United States Supreme Court has described this as constituting an approximately one in 10 chance:

Let us ... presume that it is known that, in the applicant's country of origin, every tenth adult male person is either put to death or sent to some remote labor camp. ... In such a case, it would be only too apparent that anyone who has managed to escape from the country in question will have "well founded fear of being persecuted" upon his eventual return.

See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (citing ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW*, 180 (1966)).

There are four elements that may establish a well-founded fear of persecution. They include:

- (1) **Possession or Imputed Possession:** The applicant must establish that they possess or are believed to possess a characteristic the persecutor seeks to overcome.

- (2) **Awareness:** The applicant must establish that the persecutor is aware or could become aware that the applicant possesses (or is believed to possess) the characteristic.
- (3) **Capability:** The applicant must establish that the persecutor has the capability to persecute the applicant.
- (4) **Inclination:** The applicant must establish that the persecutor has the inclination to persecute them. Note that the applicant need not establish either that the persecutor is inclined to *punish* the applicant, or that the persecutor's actions are motivated by a malignant intent.

See Immigration Officer Academy Asylum Training Manual, *Asylum Eligibility Part II: Well-Founded Fear*, available at <www.aila.org/infonet/aobt-lesson-plan-on-well-founded-fear>.



PRACTICE TIP

The USCIS uses the Asylum Officer Basic Training Course (AOBTC) to train its adjudicators. These AOBT lesson plans cover a variety of topics related to asylum law and how asylum officers adjudicate cases. Though no longer posted on the USCIS website, the University of St. Thomas Interprofessional Center for Counseling and Legal Services has an entire set of lessons that were current as of January 2017. See USCIS, *Asylum Officer Basic Training Manual* (Jan. 26, 2017) available at <<https://www.dropbox.com/sh/lnzysf0yu5sgjcd/AAD-94hCtMYKzG25unrgQvjla?dl=0>>. The AOBT has not only been long relied on by the Asylum Office, but also cited favorably as persuasive guidance in immigration judge and Board of Immigration Appeals decisions.

The applicant's fear must be both subjectively and objectively reasonable. The lawyer can establish subjective fear through a detailed affidavit from the client, describing past experiences and what the client thinks may happen upon return. Other evidence, such as medical records, police reports, other witness statements, news articles, etc., that relate to harm suffered are also strong evidence, if available. In order to support a claim that the fear is objectively reasonable, the lawyer should compile primary and secondary documentation that supports the likelihood the client would be harmed.



PRACTICE TIP

The first place adjudicators will look for secondary documentation on country conditions is the United States Department of State Human Rights Reports. They are issued annually on most countries throughout the world: <www.state.gov/j/drl/rls/hrrpt/>. The Executive Office for Immigration Review (EOIR) recently created a Virtual Law Library with country condition research information including United States government, foreign government, and non-government organization resources: <www.justice.gov/eoir/vll/country/country_index.html>. The Immigration and Refugee Board of Canada and RefWorld are also other very good resources. See Immigration

**PRACTICE TIP, CONTINUED**

and Refugee Board of Canada, <<http://www.irb-cisr.gc.ca/eng/Pages/index.aspx>>; <<http://www.refworld.org/>>. The Latin American Working Group's Central America/Mexico Migration News Brief, which attorneys can sign up to receive by email, provides a helpful regularly updated compilation of articles and reports on country conditions in the Northern Triangle and Mexico.

Be sure to adequately vet resources before submitting them—long reports should not be submitted in their entirety unless the attorney has ensured they support their case.

4. Past Persecution and Rebuttable Presumption of Future Fear

If the client meets the burden of establishing past persecution, there is a rebuttable presumption of a well-founded fear of future persecution. 8 C.F.R. § 208.13(b)(1). Once established, the burden then shifts to the government to rebut the presumption by establishing either: (1) that there has been a fundamental change in circumstances such that there is no longer a well-founded fear of persecution; or (2) that the applicant can avoid persecution by relocating to another part of the country and it would be reasonable to do so. Even if the government rebuts the presumption, the client may still be eligible for humanitarian asylum if they suffered severe past persecution or would face other serious harm.

a. Changed Circumstances

Changed circumstances most commonly include changes in country conditions, such as a regime change. They may also include other changes related to the applicant's claim, such as death of the persecutor, or changes to the applicant's situation in the United States. Regardless of the change, analysis of each applicant's facts is required to determine whether the presumption is rebutted. The lawyer should anticipate arguments regarding changed circumstances and preemptively address them with supporting documentation and legal arguments. 8 C.F.R. § 208.13(b)(1)(i)(A).

b. Internal Relocation

A client's well-founded fear can also be rebutted if the client can reasonably relocate to another part of the country of origin. 8 C.F.R. § 208.13(b)(3). The applicant need not fear country-wide persecution; rather, the presumption of well-founded fear may be rebutted if it is reasonable for the applicant to relocate considering a broad range of factors. *Hagi-Salad v. Ashcroft*, 359 F.3d 1044, 1048 (8th Cir. 2004). Further, the Board of Immigration Appeals, in *Matter of M-Z-M-R-*, 26 I&N Dec. 28, 33 (BIA 2012), emphasized that: “[f]or an applicant to be able to internally relocate safely, there must be an area of the country where he or she has no well-founded fear of persecution.” The BIA provided guidance in assessing whether there is an area that is sufficiently safe for an applicant to be required to relocate: “the purpose of the relocation rule is not to require an applicant to stay one step ahead of persecution in the proposed area, that location must present circumstances that are substantially better than those giving rise to a well-founded fear of persecution on the basis of the original claim.” *Matter of M-Z-M-R-*, 26 I&N Dec. at 33.

The BIA clarified that adjudicators assessing the possibility of relocation must engage in a two-step analysis. First, there must be a location within the country where the applicant would have no well-founded fear of persecution, that “is practically, safely, and legally accessible” to the applicant. *Id.* at 34. If the first prong of this

analysis is met, the adjudicator must then assess whether “under all the circumstances” it would be reasonable to require the applicant to relocate to that other part of the country. *Id.* The Board reminded adjudicators that the regulations list an explicitly non-exclusive set of factors they are to assess in determining whether it would be reasonable “under all the circumstances” to require an applicant to relocate, namely:

- (1) whether the applicant would face other serious harm in the place of suggested relocation;
- (2) any ongoing civil strife within the country;
- (3) administrative, economic, or judicial infrastructure;
- (4) geographical limitations; and
- (5) social and cultural constraints, such as age, gender, etc.

Id. at 34–35; *see also* 8 C.F.R. § 208.13(b)(3).



CAVEAT

When the client establishes past persecution, the government bears the burden of establishing the reasonableness of internal relocation by a preponderance of the evidence. When there is no past persecution, the applicant bears the burden of establishing internal relocation is unreasonable. In both cases, internal relocation is presumed to be unreasonable if the persecutor is the government. 8 C.F.R. § 208.13(b)(3).

c. Humanitarian Asylum

In instances where the applicant establishes past persecution, but the government has rebutted the presumption of a future fear of persecution, the applicant may still be eligible for asylum if the applicant shows there are compelling reasons not to return or that the applicant would suffer other serious harm if removed to that country. 8 C.F.R. § 208.13(b)(1)(iii).



COMMENT

In April 2020, The Advocates for Human Rights presented a training on making and documenting humanitarian asylum claims, which is available in recorded form via the Immigrant Advocates Network website, <www.immigrationadvocates.org/>.

i. Severity of Past Persecution

Compelling reasons not to return must be linked to the severity of the past persecution. 8 C.F.R. § 208.13(b)(1)(iii). *See Matter of Chen*, 20 I&N Dec. 16 (BIA 1989). Factors considered include the duration and intensity of the past persecution, the applicant’s age at the time of persecution, persecution of family members, conditions under which persecution was inflicted, whether it would be unduly frightening or painful for the applicant to

return, or whether there are continuing health or psychological problems or other negative repercussions stemming from the harm inflicted. See AOBTC, Asylum Eligibility Part I: Definition of Refugee, available at <www.aila.org/infonet/uscis-lesson-plan-overview-on-asylum-eligibility>.

ii. *Other Serious Harm*

If the government rebuts the presumption of a well-founded fear of future persecution, the applicant may also be eligible for humanitarian asylum if there is a reasonable possibility that she or he may suffer other serious harm upon removal. Importantly, the other serious harm need not be inflicted on the basis of one of the protected grounds, but the harm feared must be so serious that, in the aggregate, it equals the level of persecution. 8 C.F.R. § 208.13(b)(1)(iii). See also AOBTC, Asylum Eligibility Part I: Definition of Refugee, available at <www.aila.org/infonet/uscis-lesson-plan-overview-on-asylum-eligibility>. An adjudicator must consider factors in the applicant’s home country that could present dangers to the applicant if they returned, including both “major problems that large segments of the population face or conditions that might not significantly harm others but that could severely affect the applicant.” *Matter of L-S-*, 25 I&N Dec. 705 (BIA 2012). New physical and psychological harm are important elements to consider as other serious harm that any asylum seeker may face if returned. *Id.* at 714.



CAVEAT

Asylum pursuant to the humanitarian asylum subsection of the asylum regulations is only available to applicants who establish past persecution based on a protected ground. If the facts do not establish past persecution or cannot show a tie between that past persecution and a valid protected ground attributable to the applicant, risk of other serious harm is not considered when determining whether facts are sufficient to warrant a grant of asylum.

HUMANITARIAN ASYLUM – FACTORS TO CONSIDER	
Severity of Past Persecution	Other Serious Harm
<ul style="list-style-type: none"> • “Atrocious” • Ongoing injuries—mental or physical • Age at time of harm • Discretionary • “[D]eplorable, involving the routine use of various forms of physical torture and psychological abuse” • “Aggravated circumstances” 	<ul style="list-style-type: none"> • Reasonable possibility of other serious harm: <ul style="list-style-type: none"> <input type="checkbox"/> civil strife <input type="checkbox"/> extreme economic deprivation beyond economic disadvantage <input type="checkbox"/> situations where the claimant could experience severe mental or emotional harm or physical injury <input type="checkbox"/> forward-looking

5. Protected Grounds: Race, Religion, Nationality, Membership in a Particular Social Group, and Political Opinion

In order to establish eligibility, an asylum seeker must show that the past or future feared persecution is “on account of” one of five protected grounds: race, religion, nationality, membership in a particular social group or political opinion. The client must establish both that the client possesses characteristics to fit into one of these categories or that the persecutor has imputed characteristics to the client that fit one of these categories *and* that the

persecutor targeted the client on account of that characteristic. *See, e.g., Matter of S-P-*, 21 I&N Dec. 486 (BIA 1996) (discussing how both applicants who possess protected characteristics and applicants to whom protected characteristics have been imputed may be eligible for asylum). There may be mixed motives for the persecutor to target the applicant, but a protected ground must be “one central reason” for the persecution. INA § 208(b)(1)(B). Further, the applicant need not show the exact motivation of the persecutor, but does need to establish a “clear probability” that the persecution was on account of one of the grounds. An asylum applicant is not required to definitively prove the exact motivation of their persecutor. Instead, the applicant must provide some evidence, either direct or circumstantial, of the persecutor’s motive. *INS v. Elias-Zacarias*, 502 U.S. 478 (1992).

The client does not need to demonstrate that the persecutor has punitive intent. Rather, the client only need demonstrate that the persecutor harmed the client in order to overcome a protected characteristic the client possesses. *See, e.g., Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996) (applicant established that she suffered past persecution on account of a protected ground, even though her persecutors may have had “subjectively benign intent” in subjecting her to female genital mutilation).

a. Race

Race as a protected ground includes “all kinds of ethnic groups that are referred to as ‘races’ in common usage.” United Nations High Commissioner on Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status*, ¶¶ 68–70 (2011), available at <www.unhcr.org/publ/PUBL/3d58e13b4.pdf>. (Hereinafter “*UNHCR Handbook*”). For example, ethnic Albanians and Chechens would qualify as “races” under this definition.

b. Religion

Asylum claims based on religion can include persecution in the form of prohibition of public or private worship, membership in a particular religious community, or religious instruction. *UNHCR Handbook*, ¶¶ 71–73. Mere membership in a religious group is not usually sufficient; the asylum seeker must show ongoing serious discrimination based on religion, economic pressure, physical harm, and/or intimidation that impact the ability to practice one’s religion.



PRACTICE TIP

An applicant may establish grounds for asylum if she or he belongs to a group that has experienced a “pattern or practice” of persecution, even if the applicant has not been singled out for persecution. 8 C.F.R. § 208.13(b)(2)(iii).

c. Nationality

For purposes of asylum law, “nationality” includes citizenship or membership in an ethnic or linguistic group and often overlaps with race. *UNHCR Handbook*, ¶¶ 74–76. For example, ethnic Serbs in Croatia would qualify as a nationality for purposes of asylum law.

d. Political Opinion

An applicant's overt *or* imputed political opinion may constitute a protected ground. Overt political opinions often involve explicit membership and participation with a political party. An imputed political opinion is defined as an opinion that the persecutor believes the applicant to have, regardless of the applicant's actual opinion or even lack of an opinion. *See, e.g., De Brenner v. Ashcroft*, 388 F.3d 629 (8th Cir. 2004) (finding persecution due to political opinions imputed to petitioner by the guerillas and the government where Peruvian Shining Path guerillas expressly named petitioner as a member and supporter of APRA (political party), accused her family of supporting the government, and mistakenly singled her out as an actual worker for the APR). Political opinions can also include overt and imputed opinions on policies in the country in question, such as coercive population control, female genital mutilation, or domestic violence. According to the UNHCR, political opinion is “understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society or policy may be engaged. It goes beyond identification with a specific political party or recognized ideology.” UNHCR, *UNHCR Refugee Resettlement Handbook* (2011), available at <www.unhcr.org/46f7c0ee2.pdf>.

The BIA has provided a non-exhaustive list of factors to adjudicators for assessing political opinion and imputed political claims in the context of generalized unrest: “[i]n situations involving general civil unrest, the motive for harm should be determined by considering the statements or actions of the perpetrators; abuse or punishment out of proportion to nonpolitical ends; treatment of others similarly situated; conformity to procedures for criminal prosecution or military law;...and the subjection of political opponents to arbitrary arrest, detention, and abuse.” *Matter of S-P-*, 21 I&N Dec. 486, 494 (BIA 1996). In *Matter of S-P-*, the BIA found that nexus to the applicant's imputed political opinion was present where the applicant was interrogated by government officials because of his suspected separatist political opinion, as well as to obtain information. *Id.* at 497.

e. Membership in a Particular Social Group

The most vague and complex of the protected groups is “membership in a particular social group.” Though the UNHCR defines the “social group” as “persons of similar background, habit or social status,” *UNHCR Handbook*, ¶¶ 77–79, United States case law has elaborated on this definition to include the following requirements for a group to constitute a particular social group (PSG):

- (1) common immutable characteristic;
- (2) defined with particularity;
- (3) socially distinct within the society in question.

A “common immutable characteristic” has consistently been described as one that the group (and in particular the applicant) cannot change or should not be required to change. Common immutable characteristics have included such things as age, geographic location, gender, sexual orientation, and family ties.

For nearly 30 years, the legal test for a PSG was defined by “immutable characteristic” as articulated by the BIA in *Matter of Acosta*, 19 I&N Dec. 211, 222 (BIA 1985). In 2008, the BIA introduced particularity and social visibility into caselaw in its decisions in *Matter of S-E-G-*, 24 I&N 579 (BIA 2008) and *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008). After mixed acceptance by the circuit courts, the BIA reiterated these requirements with minimal revisions in a pair of cases issued in 2014, *Matter of W-G-R-*, 26 I&N Dec. 208 (BIA 2014) and *Matter of M-E-V-G-*, 26 I&N Dec. 227 (BIA 2014).



PRACTICE TIP

A circuit split remains in regard to the requirements that a group be defined with particularity and be socially distinct. Both requirements have been accepted by the Eighth Circuit. The lawyer may include a rejection to these additional requirements in a legal brief by explaining how the particular social group meets the *Acosta* definition, but argue in the alternative that the definition also meets the particularity and social distinction requirements.

The Attorney General has issued two recent decisions on “particular social group” that have shifted the landscape for asylum seekers pursuing protection based on their membership in protected groups that had previously been clearly recognized by the BIA and circuit courts as cognizable. In *In Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018), the Attorney General reversed the BIA’s 2014 decision recognizing “Guatemalan married women unable to leave their relationship” as a valid protected group potentially available to individuals seeking protection from domestic violence. However, as noted in section 8.2.A.2, *supra*, discussing government protection, the decision explicitly does not bar all survivors of domestic violence from seeking asylum. Moreover, in numerous cases decided since *Matter of A-B-*, federal courts have read the holding of the decision narrowly. *See, e.g., Quintanilla-Miranda v. Barr*, No. 18-60613, 2019 WL 3437658, at *1 n.1 (5th Cir. July 31, 2019) (“Nor do we express any opinion regarding other aspects of asylum law discussed in A-B- ... but not necessary to the BIA’s decision in this case.”); *Lopez v. Sessions*, 744 F. App’x 574 (10th Cir. 2018) (focusing only on the requirements of recognizability and non-circularity for particular social group formulations from *Matter of A-B-*); *Aguilar-Gonzalez v. Barr*, No. 18-3891, 2019 WL 2896442, at *3 (6th Cir. July 5, 2019) (avoiding a per se rejection of the PSG formulation of “indigenous Guatemalan women who cannot leave a relationship”). Many adjudicators throughout the country have granted protection to domestic violence survivors following the *Matter of A-B-* decision, including asylum officers and immigration judges reviewing applications of asylum seekers residing in Minnesota and the Dakotas. Domestic violence survivors seeking asylum following *Matter of A-B-* must assert other proposed particular social groups other than the group previously recognized in *Matter of A-R-C-G-* in order to receive protection. Recently, Attorney General Barr issued a decision, *Matter of A-C-A-A-*, 28 I&N Dec. 84 (A.G. 2020), which makes similarly problematic statements regarding domestic violence and child abuse based claims in its dicta, while not changing the law for asylum seekers. However, given that the similar dicta in *Matter of A-B-* has caused confusion for adjudicators since the decision was issued, advocates for asylum seekers will need to prepare to address *Matter of A-C-A-A-* when representing survivors of domestic violence, child abuse, and other gender- or family-status-based violence.



COMMENT

The Advocates for Human Rights has a Practice Supplement for attorneys representing domestic violence survivors in the Eighth Circuit after the decision in *Matter of A-B-* that discusses post-*Matter of A-B-* asylum claims in detail. The guide can be found at the Advocates for Human Rights website, <www.theadvocatesforhumanrights.org/uploads/matter_of_a-b-_supplement_final.pdf>.

Another case that may be helpful in the context of family violence survivors is the Eighth Circuit decision in *Hui*, which affirms the validity of the PSG “Chinese daughters [who are] viewed as property by virtue of their position within a domestic relationship,” but denied relief on other grounds. *Hui v. Holder*, 769 F.3d 984, 985 (8th Cir. 2014). Lawyers for asylum seekers pursuing protection based on domestic violence may want to review helpful case law for survivors of domestic violence issues prior to *Matter of A-R-C-G-*, such as the BIA’s decision in *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996), and the Eighth Circuit’s decisions in *Hassan v. Gonzales*, 484 F.3d 513 (8th Cir. 2007) and *Ngengwe v. Mukasey*, 543 F.3d 1029 (8th Cir. 2008). Attorneys representing domestic violence survivors may also look to the Department of Homeland Security’s brief to the BIA in *Matter of L-R-*, available at the Center for Gender & Refugee Studies website, <<https://cgrs.uchastings.edu/our-work/matter-l-r>>. In its brief to the BIA in this matter, the DHS recognized domestic violence survivors as potentially eligible for asylum and suggested two potential particular social group formulations that the DHS believed would be cognizable, based on the facts in *Matter of L-R-*: (1) Mexican women who are viewed as property by virtue of their position in a domestic relationship; and (2) Mexican woman unable to leave a domestic relationship. The second particular social group formulation was recognized in *Matter A-R-C-G-*, but later overturned in *Matter of A-B-*. As of the date this Deskbook was updated, there has been no negative, controlling case law casting doubt on the first particular social group formulation. It is also worth noting that the BIA, in several unpublished decisions issued for domestic violence survivors in 2018 and 2019, has upheld social groups based on the applicant’s gender plus nationality, such as “Mexican women,” “Salvadoran females,” “Guatemalan women,” and “young Honduran women.” See, e.g., *A-B-S-P-*, AXXX XXX 561 (BIA Dec. 19, 2019) (*Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018) “does not preclude all domestic violence claims without exception in the asylum context”); *E-E-G-R-*, AXXX XXX 363 (BIA Nov. 14, 2019) (remands to consider asylum claim predicated on membership in PSG of “Guatemalan women”); *S-R-P-O-*, AXXX XXX 056 (BIA Dec. 20, 2018) (remands for further consideration of whether “Mexican women” is a valid particular social group); *H-A-C-S-*, AXXX XXX 247 (BIA May 22, 2018) (remands for further consideration of whether “young women in Honduras” is a cognizable particular social group). These unpublished BIA decisions are available at the Immigrant and Refugee Appellate Center Website, <www.irac.net/unpublished/>.



COMMENT

Decision copies can be obtained via the Immigrant and Refugee Appellate Center unpublished BIA case index, available here: <<http://www.irac.net/unpublished/>>.

In a second recent decision, the Attorney General overturned the BIA’s 2017 decision recognizing the immediate family of the applicant’s father as a social group in the context of a claim for protection by a Mexican survivor of cartel violence against a family business. *Matter of L-E-A-*, 27 I&N Dec. 581 (A.G. 2019). Although the *Matter of L-E-A-* decision also contained substantial dicta, its holding was also narrow and consisted of rescinding the BIA’s decision in *Matter of L-E-A-*. Like in *Matter of A-B-*, the AG critiqued the BIA’s acceptance of DHS stipulations that the respondent met certain aspects of the refugee definition, and stated that the BIA should have conducted a fact-based inquiry on all issues instead of permitting stipulations. *Id.* at 586. The AG explicitly stated that he did not seek to foreclose all asylum claims based on family relationship, and reiterated the principle laid out in numerous previous BIA cases that asylum eligibility determinations must be made based on a case-by-case adjudication. *Id.* at 588–89. Instead, the AG reiterated that all particular social groups must be immutable, particular, and socially distinct. *Id.* at 588. The AG seems to suggest that a heightened social distinction requirement must be imposed on groups defined by family relationship, and that applicants must not only show that meaningful distinctions are made based on family relationship in their country of origin, but they must also show that their particular family is somehow

viewed distinctly from other families in their society of origin. *Id.* at 592–93. This interpretation is explicitly inconsistent with decades of BIA case law and case law from all circuit courts to have considered the question, recognizing family as a particular social group. Attorneys representing asylum seekers after the *Matter of L-E-A-* decision may wish to both argue that their clients meet the AG’s proposed heightened social distinction standard, and also argue that the proposed heightened social distinction standard is not part of the decision’s narrow holding and cannot be properly applied to their client.



COMMENT

Attorneys representing asylum seekers may also wish to reference the Practice Pointer on the decision prepared by the Catholic Legal Immigration Network, available at their website, <<https://cliniclegal.org/resources/asylum-and-refugee-law/practice-pointer-matter-l-e>>, and the *Template for Responding to Matter of L-E-A-*, created by the National Immigrant Justice Center, available at their website, <www.immigrantjustice.org/for-attorneys/legal-resources/file/template-responding-matter-l-e-asylum-office-and-immigration>.



PRACTICE TIP

The lawyer should be mindful that the adjudicators are required to apply a case-by-case analysis for each element of the asylum case. Just because a PSG was rejected in one case does not mean that the same group would be rejected in another case that may have a more supportive record. In the same way, all victims of domestic violence may not warrant receiving asylum. The lawyer should argue how the specific facts and supporting documentation in the case at hand meets the elements, even if case law includes a similar case that was denied.

6. Nexus

In addition to proving that the applicant possesses one of the protected grounds, the asylum seeker must also establish that the persecutor targeted them “on account of” that characteristic. More specifically, the applicant must establish that the characteristic was “one central reason” for being persecuted. INA § 208(b)(1)(B)(i). The courts have recognized that this standard explicitly permits asylum seekers to receive protection where persecutors have mixed motives, and that the asylum seeker need not show that persecution was or will be exclusively motivated by protected grounds. *Id.*; see also *Matter of J-B-N- and S-M-*, 24 I&N Dec. 208 (BIA 2007).

7. Government Protection

In asylum claims, the persecutor may be the government or a non-governmental actor whom the government cannot or will not control. If the persecutor is the government, it is obvious the government will not protect the applicant. If the persecutor is a non-governmental actor, in order to receive asylum, the applicant must establish that they sought protection from the government and the government failed to provide the applicant effective protec-

tion from the persecutor, or that it would have been futile to seek government protection. *See Ngengwe v. Mukasey*, 543 F.3d 1029, 1035–36 (8th Cir. 2008).

The Ninth Circuit issued a helpful en banc decision reaffirming the principal that an applicant for asylum may show lack of government protection by presenting sufficient evidence to demonstrate that it would be futile to report the persecution to law enforcement. *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051 (9th Cir. 2017). In finding that an applicant who had not reported his persecution to law enforcement could still be eligible for asylum, the Ninth Circuit observed that “[t]o determine whether private persecutors are individuals whom the government is unable or unwilling to control, we must examine all relevant evidence in the record, including [country] reports.” *Id.* at 1069. The Ninth Circuit further explained that “[l]ike all other circuits to consider the question, we do not deem the failure to report to authorities outcome determinative, and we consider all evidence in the record.” *Id.*

8. Bars to Asylum Relief

There are a variety of reasons that an asylum seeker may be ineligible for asylum. They include applicants who:

- are persecutors of others, INA § 208(b)(2)(A)(vi);
- firmly resettled as defined in 8 C.F.R. § 208.15;
- were previously denied asylum by an immigration judge or the BIA, INA § 208(a)(2)(C); 8 C.F.R. § 208.4(a)(3);
- did not file for asylum within one year of last entry to the United States INA § 208(a)(2)(B); 8 C.F.R. §§ 208.4 & 208.34 (potential exceptions to the one-year filing deadline are discussed further in section 8.1.D.1, *infra*);
- have been convicted of an aggravated felony, INA § 208(b)(2)(B)(i); INA § 101(a)(43);
- have been convicted of a particularly serious crime, INA § 208(a)(2)(A)(ii);
- pose a danger to the security of the United States, INA § 208(a)(2)(A)(iv);
- committed a serious nonpolitical crime, INA § 208(a)(2)(A)(iii);
- may be removed to a safe third country pursuant to a bilateral or multilateral agreement, INA § 208(a)(2)(A);
- are inadmissible on account of terrorist-related activity, INA § 208(a)(2)(A)(v); or
- provide material support to a terrorist group, INA § 208(a)(2)(A)(v).



PRACTICE TIP

The final rule entitled “Procedures for Asylum and Bars to Asylum Eligibility” was published on October 20, 2020. It is set to go in effect on November 20, 2020 and will have significant impact. The rule can be accessed here: <www.federalregister.gov/documents/2020/10/21/2020-23159/procedures-for-asylum-and-bars-to-asylum-eligibility>. The rule significantly impacts asylum seekers with criminal histories and immigration violations. When preparing asylum applications to be filed after Nov. 20, 2020, practitioners should review the rule and follow any related litigation that may impact its implementation.

B. Withholding of Removal

Withholding of removal is often an alternative form of relief for clients who are barred from receiving asylum for one of the reasons listed in the previous section. Like asylum, withholding of removal is designed to protect individuals from being persecuted in their country of origin. Though there are fewer bars to eligibility for those seeking withholding of removal, the standard of proof is significantly higher and the benefits are significantly lower than for asylum. Unlike asylum, withholding is not subject to a one-year filing deadline. In addition, withholding is a mandatory form of relief; it is not discretionary, as is the case with asylum. *See* INA § 241(b)(3); 8 U.S.C. § 1231(b)(3). That said, withholding has a higher standard for likelihood of harm.



PRACTICE TIP

If a client filed for asylum after the one-year deadline and does not appear to meet an exception, or the client has a significant criminal history or specifically an aggravated felony, the client may be eligible for withholding as an alternative to asylum. In order to preserve all potential forms of relief, withholding of removal should always be sought in the alternative when filing for asylum.

The benefits under withholding are limited. An individual who is granted withholding:

Cannot	Can
Be removed from the United States to the country from which the individual was fleeing persecution.	Be removed to a third country if one is available.

Cannot	Can
Adjust the individual’s status to legal permanent residency.	Obtain and renew work authorization under the (a)(10) category and is not required to pay the filing fee. (Note that final rules on USCIS fee hikes would add a fee for work permits for those granted withholding. The rule was enjoined as of publication of the 2020 Update to this Deskbook. See USCIS & DHS, <i>U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements</i> , RIN 1615-AC18 (Aug. 8, 2020), available at < https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-16389.pdf >.)
File for family members living abroad to reunify with them in the United States.	Receive some public benefits.
Travel outside the United States without securing advance parole and are not eligible for a refugee travel document.	



PRACTICE TIP

A grant of withholding of removal is country specific, and requires the immigration judge (IJ) to actually enter an order of removal if that is the only relief granted. *Matter of I-S- & C-S-*, 24 I&N Dec. 432 (BIA 2008). Therefore, the order frequently is “Client is ordered removed to any country other than X (country of citizenship/nationality).” Typically, asylum seekers will decline to designate a country of removal during the pleadings phase of removal proceedings under the logic that an asylum seeker fears return to the country of nationality and therefore would not want to be removed there if no relief is available. See Chapter 6, An Overview of Minnesota’s Immigration Court, section 6.9.

1. Eligibility Standard for Withholding of Removal

a. “More Likely Than Not”

In order to satisfy the test for withholding of removal, an individual must show a clear probability of persecution by the government or a group the government cannot control on account of one of the protected grounds. *INS v. Stevic*, 467 U.S. 407 (1984). The applicant must show that it is “more likely than not” that they will be persecuted, which essentially means that there is a greater than 50-percent chance of persecution. Note that this requires a higher probability than asylum’s 10 percent.

b. Nexus Required

As with asylum, in order to receive withholding of removal protection, the applicant must show that past persecution or fear of future persecution is on account of one's race, religion, nationality, membership in a particular social group, or political opinion. 8 C.F.R. § 208.16(b).

c. Presumption If Persecuted in the Past

As in asylum, however, if the individual can show that they suffered persecution in the past, then that individual will receive the benefit of a presumption that their life or freedom would be threatened in the future.

2. Bars to Eligibility For Withholding of Removal

An individual is not eligible for withholding of removal if they:

- are a persecutor of others; or
- have been convicted of a particularly serious crime.

Matter of Y-L-, 23 I&N Dec. 270 (A.G. 2002). Unlike for asylum, an aggravated felony conviction does not automatically bar an applicant from withholding of removal unless the applicant received a sentence of five or more years, imposed or suspended. An aggravated felony with a sentence of less than five years is presumed to be "particularly serious" but requires individual examination of the nature of the conviction, sentence imposed, and circumstances and underlying facts of the conviction. *See* INA § 241(b)(3)(B).



PRACTICE TIP

In some cases, the government attorney may offer withholding of removal as a sort of "plea bargain" if the client is willing to forego the asylum relief. In preparation, it is important to discuss the benefits and drawbacks of withholding with the client in removal proceedings prior to the final hearing so that the client understands the difference between withholding and asylum. The drawbacks may be particularly significant if the client has family members overseas that the client may wish to petition to bring to the United States or if the client wants to travel outside the United States in the future. The lawyer should inquire with the government attorney about which elements of the asylum definition they believes are not sufficiently met. With local judges granting less than 30 percent of asylum claims, the lawyer should prepare the client for a potential appeal if the offer to stipulate to withholding of removal is not accepted.



PRACTICE TIP, CONTINUED

WITHHOLDING VERSUS ASYLUM		
	Asylum	Withholding
Work Authorization	No longer need to apply for EAD, but can under (a)(5) category. I-94 card is sufficient proof of work authorization incident to status.	Need to renew EAD annually, under (a)(10) category. No fee. (Note that final rules on USCIS fee hikes would add a fee for work permits for those granted withholding. The rule was enjoined as of publication of the 2020 Update to this Deskbook. See USCIS & DHS, <i>U.S. Citizenship and Immigration Services Fee Schedule and Changes to Certain Other Immigration Benefit Request Requirements</i> , RIN 1615-AC18 (Aug. 8, 2020), available at < https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-16389.pdf >.)
Public Benefits	Refugee cash assistance eligible non-citizen.	Eligible non-citizen.
Path to Permanent Status	Can apply for permanent residence one year after grant. Can apply for citizenship five years later.	No path to permanent status. Withholding can be revoked if country conditions change or if criminal activity bars withholding relief.
Travel Outside U.S.	Can travel to any country other than country of origin (where persecution is feared). Need to apply for refugee travel document.	No travel outside the U.S. Departure = self-deport.



PRACTICE TIP, CONTINUED

WITHHOLDING VERSUS ASYLUM		
	Asylum	Withholding
Family Reunification	Can apply for spouse and children who were 21 at the time asylum application was submitted.	No family reunification.
Release from Detention	Immediate	Immediate, though some individuals granted withholding have remained in detention for at least 90 days while DHS attempts to remove to a third country.

C. Convention Against Torture/Deferral of Removal

The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) prohibits the return of a person to another country where substantial grounds exist for believing that the person would be in danger of being subjected to torture if returned. *Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002); *see also Matter of S-V-*, 22 I&N Dec. 1306 (BIA 2000). The ability to raise a claim for relief from removal under the CAT was incorporated into United States domestic immigration law. *See* 8 U.S.C. § 1231 Note (2005); INA § 241 Note (2005); *see* Pub. L. No. 105-277, § 2242.

A CAT claim may be raised even after a final order of removal/deportation has been issued, for example if someone is apprehended after failing to depart after a removal order is issued. The advantage to CAT is that there are no bars to eligibility; however, the benefits are minimal. Since the treaty itself does not contain any bars to its mandate of non-return, aggravated felons can make claims for relief if they fear torture. Additionally, there is no nexus requirement, so an applicant is not required to establish their fear if torture is on account of any of the protected grounds that apply to asylum and withholding of removal relief.

There are two separate types of protection under CAT. *See* 8 C.F.R. §§ 208.16–208.17.

1. Withholding Under CAT

The first type of protection is a form of withholding under CAT. Withholding under CAT prohibits the return of an individual to their home country. It can only be terminated if the individual's case is reopened and the Department of Homeland Security (DHS) establishes that the individual is no longer likely to be tortured in their home country.

2. Deferral of Removal Under CAT

The second type of protection is called deferral of removal under CAT. Deferral of removal under CAT is a more temporary form of relief. Deferral of removal under CAT is appropriate for individuals who would likely

be subject to torture, but who are ineligible for withholding of removal, such as persecutors, terrorists, and certain criminals. It is terminated more quickly and easily than withholding of removal if the individual is no longer likely to be tortured if forced to return to their home country. Additionally, if an individual were granted deferral of removal under CAT, the DHS would still be able to detain the individual if already subject to detention.

3. Benefits Under CAT Relief

Like withholding of removal, the benefits to CAT are limited. An individual who is successful under a CAT claim cannot be removed from the United States to the country from which the individual fled persecution, but can be removed to a third country if one is available. The individual may not adjust their status to legal permanent residency, but can obtain work authorization. Furthermore, a person granted relief under CAT has no opportunity for family reunification or travel outside the United States.

4. Eligibility Based on Future Fear of Torture

In order to be eligible for both forms of CAT relief, the client must show that it is more likely than not that she or he would be tortured if returned to the country of origin.

“Torture” is defined as any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from the person or a third person information or a confession, punishing the person for an act they or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in official capacity. CAT, Art. 1; 8 C.F.R. § 208.18. The BIA interpreted the definition of “torture” as “an extreme form of cruel and inhuman punishment and [that] does not extend to lesser forms of cruel, inhuman, or degrading treatment or punishment.” *Matter of J-E-*, 23 I&N Dec. 291 (BIA 2002). The BIA also found that indefinite detention, without further proof of torture, does not constitute torture under this definition. *Id.* Beatings can constitute torture if they are sufficiently severe. *See Zewdie v. Ashcroft*, 381 F.3d 804, 808–10 (8th Cir. 2004) (severe beatings of applicant constituted torture); *Jean-Pierre v. U.S. Att’y Gen.*, 500 F.3d 1315, 1325–27 (11th Cir. 2007); *Kang v. U.S. Att’y Gen.*, 611 F.3d 157, 166–67 (3d Cir. 2010); *Namo v. Gonzales*, 401 F.3d 453, 455, 458 (6th Cir. 2005); *Al-Saher v. INS*, 268 F.3d 1143, 1147 (9th Cir. 2001). Additionally, imminent death threats have been found to constitute torture, even if the death threatened were a painless death. *Comollari v. Ashcroft*, 378 F.3d 694, 697 (7th Cir. 2004) (“Even if death itself is painless, moreover, the anticipation of it can be a source of acute mental anguish; if the threat of imminent albeit painless death were deliberately employed to cause such anguish, it would be a form of torture.”).

In addition to proving that the harm the applicant suffered and fears is sufficiently severe, they must show that the torturer would act with specific intent in harming them, for an illegitimate purpose such as those described above, and would either be a public official, or be acting with the consent or acquiescence of a public official, or other person acting in an official capacity. The Eighth Circuit has held that in order for a person to act in “official capacity” for the purposes of CAT relief, the person must act “under color of law.” *Ramirez-Peyro v. Holder*, 574 F.3d 893, 899 (8th Cir. 2009). The Eighth Circuit has explained that a public official “acts under color of law when he misuses power possessed by virtue of ... law and made possible only because he was clothed with the authority of ... law.” *Id.* at 900. In *Ramirez-Peyro*, the Eighth Circuit explained that the interpretation of this term does not require that the person be acting in compliance with the government’s official stated position.

Instead, the court in *Ramirez-Peyro* explained that “under ‘color’ of law means under ‘pretense’ of law,” and that “acts of officers who undertake to perform their official duties are included whether they hew to the line of

their authority or overstep it.” *Id.* (citing *Screws v. United States*, 325 U.S. 91 (1945)). The court further explained that:

[T]he rule does not require that the public official be executing official state policy or that the public official be the nation’s president or some other official at the upper echelons of power. Rather, as we and the Supreme Court have repeatedly held, the use of official authority by low-level officials, such as police officers, can work to place actions under the color of law even where they act without state sanction.

Id. at 901.

In 2019, the BIA issued a decision that was largely consistent with this precedent, except that it strained the legal standard expressed in *Ramirez-Peyro* and other consistent circuit court case law to find that Guatemalan police officers who tortured an applicant while in uniform and carrying police weapons and handcuffs did not act under color of law. The BIA held that, in order to demonstrate that they are more likely than not to suffer torture, an applicant must demonstrate that they would suffer harm that would be perpetrated by a public official acting under color of law. *Matter of O-F-A-S-*, 27 I &N Dec. 709 (BIA 2019). The BIA cited to *Ramirez-Peyro* to explain that an official acts under color of law when the official misuses power possessed by virtue of law and made possible because the official was clothed with the authority of law. *Id.* at 715. The court in *Matter of O-F-A-S-* created a non-exhaustive list of relevant factors in assessing whether an individual acted under color of law from some relevant circuit court precedent on the issue, including: (1) whether government connections provided the officer access to the victim, the victim’s whereabouts, or identifying information; (2) whether a law enforcement officer was on duty and in uniform at the time of their conduct; and (3) whether an officer threatened to retaliate through official channels if the victim reported their conduct to authorities. *Id.* at 715–17. The BIA further emphasized that “whether a public official’s actions are under color of law is a fact-intensive inquiry, and the Immigration Judge should assess both the direct and circumstantial evidence to make this determination.” *Id.* at 717. The BIA also explained that, even if an applicant was not tortured by a public official or person acting in an official capacity, the applicant can show eligibility for protection under the CAT if the applicant can demonstrate that a public official or person acting in an official capacity consented to or acquiesced to the torture. *Id.* at 718. Applicants who fear torture by police officers and other low-level government officials should carefully brief this decision.

The standard of proof under CAT is higher than the standard for asylum. Here, the alien must prove that it is “more likely than not” that they would be tortured if forced to return. *Matter of G-A-*, 23 I&N Dec. 366 (BIA 2002). The evidentiary proof for torture is very similar to the proof for asylum or withholding claims. In assessing likelihood of future torture, the adjudicator must consider, among other factors, “all evidence relevant to the possibility of future torture,” including, but not limited to: (1) evidence of past torture inflicted upon the applicant; (2) evidence of possibility of internal relocation; (3) evidence of “gross, flagrant or mass violations of human rights;” and (4) other relevant information regarding country conditions. 8 C.F.R. § 1208.16(c)(3).

D. Process

Applications for asylum can be filed affirmatively or defensively. Requests for withholding of removal and CAT relief can only be made defensively, but the lawyer should identify the claim during the affirmative process. Affirmative applications are filed with one of eight regional USCIS Asylum Offices (AO) and are initially processed by a USCIS service center depending upon where the client lives. Defensive applications are filed in open court. In 2016, the immigration court changed its rules to permit applicants to file asylum applications by mail or at the court window, in addition to filing them in court. See Michael C. McGoings, *Operating Policies and Procedures*

Memorandum 16-01: Filing Applications for Asylum (Sept. 14, 2016), available at <www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf>. Thus, asylum seekers must ensure that they file their applications within one year of entering the United States, regardless of whether they have a hearing before the court scheduled within a year of entering the country.

Key Procedural Differences Between Affirmative and Defensive Asylum Applications	
AFFIRMATIVE	DEFENSIVE
Non-adversarial (asylum office) office setting.	Adversarial (IJ, Office of the Principal Legal Advisor (OPLA) attorney) courtroom setting.
Applicant’s attorney plays a passive role during the interview stage with limited questioning capability and short closing statement at the end of the interview.	Applicant’s attorney plays an active role in all stages of the process.
AO controls questioning, with opportunity for the attorney to suggest additional questions at the end of the interview.	Attorneys and IJ control questioning.
Can not object to questions.	Can object to questions by OPLA attorney and IJ.
Typically, applicant testifies. There may be exceptions, particularly if the applicant is a child.	Applicant and other witnesses may testify.
Informal review of original documents.	Potential forensic evaluation of original documents.
AO takes notes, but no formal transcript.	Recorded and formal transcript generated if case goes on appeal.
Applicant must bring interpreter with him/her.	Court provides an interpreter. Applicant cannot object to interpretation from the stand, must bring an observing interpreter for this purpose.
Can apply for a work permit once case has been pending 150 days, so long as applicant does not cause delay (i.e., request to reschedule interview). New rules require a 365-day waiting period for the work permit, unless the applicant is a member of Asylum Seekers Advocacy Project (ASAP) or CASA Organization, pursuant to a preliminary court injunction in <i>Casa de Maryland Inc. v. Wolf</i> , Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Practitioners should review eligibility guidelines when determining whether their client can file for a work permit. See ASAP, <i>Work Permits for ASAP Members</i> (Oct. 27, 2020), available at < https://asylumadvocacy.org/work-permits-for-asap-members/ >.	Can apply for a work permit once case has been pending for 150 days, so long as applicant does not cause delay (i.e., not accept the first available individual hearing date). New rules require a 365-day waiting period for the work permit, unless the applicant is a member of Asylum Seekers Advocacy Project (ASAP) or CASA Organization, pursuant to a preliminary court injunction in <i>Casa de Maryland Inc. v. Wolf</i> , Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020). Practitioners should review eligibility guidelines when determining whether their client can file for a work permit. See ASAP, <i>Work Permits for ASAP Members</i> (Oct. 27, 2020), available at < https://asylumadvocacy.org/work-permits-for-asap-members/ >.

For affirmative applications, the lawyer must include an original and a full copy of the application packet. If filing the application in court, the lawyer must provide the original form (with original signatures and photograph(s)) to the immigration judge and a copy to the government. The lawyer should prepare a separate filing with supporting documentation and provide complete packets to the immigration judge and government. The lawyer should closely review “Chapter 3, Filing with the Immigration Court” in the Immigration Court Practice Manual (ICPM) for guidance on proper filing requirements, available at <www.justice.gov/eoir/vll/OCIJPracManual/ocij_page1.htm>. See also Chapter 6, An Overview of Minnesota’s Immigration Court, for coverage of the filing requirements in immigration court.



PRACTICE TIP

New rules have created new barriers to work permits for asylum seekers. Some, but not all, provisions have been temporarily enjoined for some members pending litigation. See *Casa de Maryland Inc. v. Wolf*, Civ. No. 8.20-cv-02118 (D. Md. Sept. 11, 2020).

Practitioners should review eligibility guidelines when determining whether their client can file for a work permit. See ASAP, *Work Permits for ASAP Members* (Oct. 27, 2020), available at <<https://asylumadvocacy.org/work-permits-for-asap-members/>>.

Rule/Change	Operative Date	Exceptions
30-day processing requirement	Eliminated for <i>initial</i> I-765s filed after 8/21/20	Rule never applied to renewals, but can file more than 90 days before current EAD expires.
365-day waiting period for EAD eligibility	<i>Initial</i> I-765s filed on or after 8/25/20	Rule does not apply to renewal applications.
1-year deadline bar	Ineligible for EAD if I-589 was filed after the 1-year-deadline and I-765 was filed on or after 8/25/20	<ul style="list-style-type: none"> • UACs • Determination from asylum officer or immigration judge that an exception applies. • Applications lodged with the immigration court before 8/25/20 (per I-765 instructions but not USCIS guidance)
Illegal Entry Bar	Entry or attempted entry other than port of entry on or after 8/25/20	Present to DHS official within 48 hours, claim a fear of persecution or torture, and establish “good cause” for entering between ports of entry.

**PRACTICE TIP, CONTINUED**

Rule/Change	Operative Date	Exceptions
Criminal Bars	Convicted of aggravated felony at any time on/after 8/25/20 Convicted of particularly serious crime Committed serious non-political crime outside the U.S.	N/A
EAD Termination	AO and IJ decisions on/after 8/25/20. Automatic termination if asylum is denied by AO, denied by IJ and no BIA appeal is filed, or upon BIA denial.	UACs “denied” by AO but referred back to the IJ.
Denial of EADs based on applicant-caused delays	Initial I-765s filed on or after 8/25/20 with unresolved delays at time of filing	Rule does not apply to renewal applications.

1. One Year Filing Deadline

Applications for asylum must be filed within one year of the client’s last date of entry to the United States. Some exceptions may apply, but the lawyer should take great care to verify the client’s last date of entry and ensure that the application is filed before the one-year mark. Note that pursuant to new rules, supplements filed less than 14 days before the asylum interview will be considered “applicant-caused delays” and may result in ineligibility for initial work authorization.



PRACTICE TIP

The one-year filing deadline applies to the client's *last date* of entry into the United States. While prior entries may be relevant if the client previously entered the United States after the past persecution occurred, one year from the date of the last entry is the date from which the one-year filing deadline is calculated.

In March 2018, a federal court in Seattle found that the failure to provide asylum seekers with notice of the one-year asylum application period violates congressional intent to ensure that asylum is available for those with legitimate claims of asylum. The court ruled that the Department of Homeland Security must provide all class members—defined as individuals who enter the United States, express a fear of return to their home countries, and then are released from immigration custody—with written notice of the one-year deadline, and the government must accept as timely filed any asylum application from a class member that is filed within one-year of adoption of the notice. The court also ordered the government to adopt, publicize, and implement uniform procedural mechanisms that will ensure class members are able to file their asylum applications.

The American Immigration Council's case decision summary and documents can be found on their website. See American Immigration Council, *Challenging Obstacles to Meeting the One Year Filing Deadline for Filing an Asylum Application*, available at <<https://www.americanimmigrationcouncil.org/litigation/challenging-obstacles-meeting-one-year-filing-deadline-filing-asylum-application>>.

If the client meets with the lawyer after having been in the United States for more than one year, the lawyer should carefully evaluate whether the client appears to meet an exception to the one-year filing deadline. While the client need not be in lawful status in order to file an affirmative asylum application, submitting the application will alert the immigration authorities that the client is in the United States. If the client is not in a lawful nonimmigrant status when the AO issues its decision, the client will be placed into removal proceedings if the asylum claim is not granted. The lawyer should fully explain these consequences before a client decides to file the application.

Exceptions to the one-year filing deadline include extraordinary circumstances that occurred during the one-year period and changed circumstances that occurred any time after the client entered the United States. See INA § 208(a); 8 C.F.R. § 208.4(a). In addition to showing that an exception applies, the client must also establish that the application was filed *within a reasonable period of time* after the extraordinary or changed circumstance occurred. See AOBTC Lesson Plan Overview, “One Year Filing Deadline” (Mar. 23, 2009), available at <www.aila.org/infonet/asylum-officer-basic-training-one-year-filing>.



PRACTICE TIP

The same application form is used for applications for asylum, withholding of removal, and relief under the CAT. Lawyers should preserve the argument for asylum eligibility for clients filing defensive claims in removal proceedings even if the client may only have a weak argument for an exception to the one-year filing deadline. Timelines for removal proceedings can often be unpredictable and exceptions to the one-year filing deadline can occur even after the application is filed. Lawyers should also preserve claims to relief under the CAT by ensuring that they check the boxes on pages 1 and 5 indicating that the client would like to pursue CAT relief in addition to asylum, and document any facts relevant to torture, such as evidence that the government is likely to torture the applicant or acquiescence to the applicant's torture if the applicant is returned, where the form requests the applicant to indicate if they fear torture in the future.

2. The Application Packet for Affirmative Filing

An affirmative asylum packet should include the following items:

- (1) **Form G-28, Notice of Entry of Appearance as Attorney (on blue paper for case).**
- (2) **Form I-589, Application for Asylum and Withholding of Removal (Be sure to use the most current one by checking the USCIS website at <https://www.uscis.gov/>).**
 - Note: there is no filing fee for an asylum application.
- (3) **One passport-style photograph** (stapled to the signature page of the I-589).
- (4) **Table of contents with supporting documentation.**
- (5) **Primary documentation:**
 - Detailed affidavit providing a narrative of the asylum claim.
 - Proof of identity and nationality (i.e., complete copy of passport or copy of applicant's birth certificate). (Note: all non-English documents submitted to the immigration service must be accompanied by an English translation and certification of translation.)
 - o NOTE: Applicants MUST submit a complete copy, plus one duplicate copy, with the asylum application.
 - Proof the client belongs to one of the protected classes (i.e., party card for political claims, baptism certificate for religious-based claims, etc.).
 - Documentation related to persecution (i.e., medical records, photographs, arrest warrants, expert statement from mental health examiner, affidavits from family and friends with knowledge of past harm or ongoing threats from persecutor, etc.).

(6) Secondary documentation

- Country condition documentation (i.e., United State Department of State Human Rights Report, news articles, reports by non-governmental organizations, etc.).
- Expert statements (i.e., academic experts on country conditions for the protected group in question).

(7) Legal brief

For defensive applications, the lawyer should file Form EOIR-28, Notice of Entry of Appearance as Attorney, electronically via the EOIR portal if not done previously (<https://portal.eoir.justice.gov/>). See Chapter 6, An Overview of Minnesota's Immigration Court. The lawyer should file the following at filing window or at the master calendar hearing as three separate exhibits:

- (1) **Form I-589, Application for Asylum and Withholding of Removal**
- (2) **One passport-style photograph** (stapled to the signature page of Form I-589)
- (3) **Supporting documentation with table of contents**

**PRACTICE TIP**

The immigration court no longer requires that the asylum claim be filed at a master calendar hearing. The asylum claim can be filed at the immigration court filing window. See Michael C. McGoings, *Operating Policies and Procedures Memorandum 16-01: Filing Applications for Asylum* (Sept. 14, 2016), available at www.justice.gov/sites/default/files/pages/attachments/2016/09/14/oppm_16-01.pdf. Respondents who were placed into removal proceedings prior to the issuance of this OPPM and filed their asylum claims after their one-year filing deadline should consider arguments for the judge to exercise discretion in finding an exception to the one-year filing deadline if they did not receive notice of the change. Further, lawyers should follow the pre-order instructions on filing I-589s that can be found in the OPPM appendix.

a. Legal Brief**PRACTICE TIP**

Even if the lawyer is filing an asylum claim affirmatively with the AO, it is wise to consider conforming the filing to the procedures regarding pagination as outlined in the Immigration Court Practice Manual (ICPM). The AO does not have strict filing requirements and complying with the ICPM will save time reformatting the filings in the event the case is referred to the immigration judge.

Additional documentation can be submitted after the initial filing, but at a minimum, the supporting documentation should include country conditions information such as the most current United States Department of State Human Rights Report.

b. Frivolous Findings and the Possibility of Detention

Anyone who files a frivolous asylum application is permanently ineligible for many benefits under the immigration laws. INA § 208(d)(6). In order to be found to have filed a frivolous application, the individual must have been advised of the consequences of filing a frivolous application. INA § 208(d)(4). This generally means the immigration judge will read the notice, and provide a written notice to the applicant at the master calendar hearing. A determination of frivolous filing will generally be made at the conclusion of proceedings.

Frivolous findings are not frequently made, but the lawyer should be aware of this possibility and discuss the standard consequences with the client prior to filing the asylum application.

3. Receipt and Biometrics

For affirmative applications, the USCIS AO that will adjudicate the case (the Chicago AO for applicants residing in Minnesota) mails the applicant and attorney a notice acknowledging receipt of the application. Any further correspondence about the case should be directed to the AO and not to the USCIS Service Center where the application was filed. The applicant will also receive an appointment notice to have biometrics taken (fingerprinting and photograph). The applicant must attend their biometrics appointment, or their application may be considered abandoned by the asylum office.

For defensive applications, the government attorney will provide instructions on submitting a request for a biometrics appointment at the master calendar hearing when the asylum application is filed. The lawyer will need to submit a request for biometrics to be taken prior to the final hearing by submitting a copy of the instruction sheet provided by the government attorney, a signed Form G-28, and copy of the first three pages of the Form I-589 to the USCIS processing center designated on the instruction sheet. If the attorney fails to timely request a biometrics appointment, the immigration judge may consider the application to be abandoned.



CAVEAT

The lawyer should calendar a reminder to ensure that biometrics are taken prior to the individual hearing by contacting the OPLA attorney to request that the biometrics be refreshed. If biometrics are not taken, the immigration judge may consider the application abandoned and pretermite the application for asylum. This risk is real and the lawyer must do everything possible to avoid this risk.

4. Supplementing the Record

Affirmative applications can be supplemented up until the AO makes a decision on the case. This includes mailing additional documentation into the asylum office after the applicant receives a receipt notice, submitting additional documentation at the asylum interview, or mailing documentation to the AO after the interview has taken place.

Defensive applications can be supplemented according to deadlines provided in the ICPM or as specified by the immigration judge. If amendments are needed to the Form I-589, a “red-lined” version should be submitted with a corresponding cover page that includes revisions made in red ink and changes numbered on the form. Any submissions made after the deadline should be accompanied by a “motion to accept untimely filing.”

5. Asylum Interview or Hearing

Timing for the client to be called for an affirmative asylum interview varies. Interviews for residents of Minnesota are held when officers from the Chicago AO make circuit rides to the Minneapolis-St. Paul USCIS Office to conduct interviews. The lawyer can inquire with the AO to find out when the next circuit ride is scheduled by emailing them at Chicago.Asylum@uscis.dhs.gov.

Interview notices are sent out approximately 21 days prior to the interview. Interviews are held at the USCIS Minneapolis office located at 250 S Marquette Ave #710, Minneapolis, MN 55401. Asylum interviews last approximately 90 minutes to three hours. Like most USCIS interviews, the applicant is responsible for bringing an interpreter; however, USCIS will have an interpreter monitor on the phone to verify the accuracy of the interpretation. The lawyer generally serves a passive role during an affirmative asylum interview. The lawyer is able to take notes, but cannot make formal objections to the officer’s questions. The lawyer should, however, request a break, provide clarification, or object if necessary. There is no recording or transcript of the interview and the asylum officer does not provide a copy of the interview notes; however, the lawyer can submit a Freedom of Information Act (FOIA) request to obtain a copy of the notes at a later date. The lawyer should take detailed notes during the interview, as they will have no other record of the asylum officer’s questions and their client’s response. The lawyer is allowed to make a closing statement when the asylum officer finishes questioning the client. The lawyer should have a written closing statement prepared that includes references to supporting documentation in the filing. The lawyer should direct the asylum officer to the supporting evidence during the closing statement. The lawyer can offer to submit the closing statement to the officer if it contains information not thoroughly covered in any legal brief submitted.



PRACTICE TIP

The AO accepts evidence from applicants up until a decision is issued on a case. If the lawyer identifies or encounters additional evidence after the asylum interview, this information can be submitted to the AO for consideration.

For defensive claims, the immigration judge will usually set a date for the individual merits hearing at the master calendar hearing when the asylum application is formally acknowledged by the court. The immigration court provides an interpreter for individual hearings. An interpreter is provided at the master calendar hearings. The attorney may have to specifically request an interpreter be called if the client speaks a less common language. A Spanish language interpreter will typically be present, and judges have capacity to call interpreters to interpret for the client in other languages.

Attorneys may wish to bring an interpreter to sit with them if they need to have a conversation with the client in the client’s best language during the hearing. The court’s interpreter is only available to interpret formal communications on the court record. Note that USCIS issued a temporary rule effective from Sept. 23, 2020 to Mar. 22, 2021 that requires asylum applicants who cannot proceed with the interview in English to use DHS-

provided telephonic interpreters. *See* 85 Fed. Reg. 59655 (Sept. 23, 2020), *available at* <www.federalregister.gov/documents/2020/09/23/2020-21073/asylum-interview-interpreter-requirement-modification-due-to-covid-19>.



PRACTICE TIP

If the lawyer is not fluent in the client's first language that will be used for the individual merits hearing, an interpreter fluent in that language should be present at the hearing. The lawyer may object if the court's interpreter is inaccurately interpreting testimony. Even if the client is proficient in English, the client may not object to interpretation of their own testimony.

At a defensive individual hearing the lawyer should prepare direct examination questions for the client as well as prepare the client for cross-examination by the government attorney. The immigration judges often ask questions of the client while on the witness stand as well. The attorney can—and should—prepare an opening and closing statement and be prepared to redirect if needed. The rules of evidence in immigration courts are different than the standard rules; however, attorneys should still take an active role to objecting and making arguments.



PRACTICE TIP

For a helpful practice advisory for attorneys regarding the rules of evidence applicable in immigration court, see CLINIC, *Practice Advisory: Rules of Evidence in Immigration Court Proceedings* (Mar. 13, 2020), *available at* <<https://cliniclegal.org/resources/removal-proceedings/practice-advisory-rules-evidence-immigration-court-proceedings>>.

6. Decision

For affirmative applications for individuals residing in Minnesota, a decision is not provided at the end of the interview, rather it is mailed to the applicant and lawyer when a decision is made. Some asylum offices do require that an applicant come to the office to pick-up the decision; however, that has not been the practice for Minnesota-based applicants.

**PRACTICE TIP**

If the AO does not grant asylum to an individual who is not in a legal nonimmigrant status at the time of the decision, the individual will be placed into removal proceedings and the case will be referred to the immigration judge for de novo review. If the individual is in some lawful nonimmigrant status, such as a student, the AO issues a “Notice of Intent to Deny” and the lawyer or applicant will have an opportunity to respond before the AO makes its final decision. If it does not grant asylum, a denial notice will be sent out, but the individual will maintain their nonimmigrant status.

For defensive claims, the immigration judge may issue an oral decision from the bench on the day of the individual hearing. Alternatively, the judge may issue a written decision on a later date. If a written decision will be issued, the judge usually closes the proceedings and no further evidence may be submitted. An exception may be made if the judge allows for time for the parties to submit a written closing statement. The lawyer should have a written closing statement prepared for the day of the hearing. If time is allowed to submit a written closing statement, the lawyer should take the time to review and revise the statement as appropriate.

If the judge issues a decision on the day of the hearing, the parties will have an opportunity to indicate whether they will reserve appeal. If both parties waive appeal, the decision will be final. If asylum is granted, the client should receive an I-94 card in the mail indicating indefinite asylum status. If appeal is reserved, the parties have 30 days from the decision date to file an appeal with the BIA. If a written decision is issued, appeal is automatically reserved and the decision will not be final until the 30 days have elapsed.

E. Dependents

Legal spouses and children under the age of 21 at the time the asylum application is filed are eligible to be considered dependents on an asylum application. If the dependents are in the United States at the time the asylum application is filed, they can be included as part of the application by including a copy of the principal applicant’s asylum application and affixing a photograph of the dependent over the principal’s photo on the signature page of the application.

If dependents are outside of the United States at the time the spouse or parent is pursuing the asylum application, the principal must file a Form I-730 Refugee/Asylee Petition after asylum is granted.

**CAVEAT**

If the applicant is filing a defensive asylum application and qualifying dependents are in the United States, but not in removal proceedings, the immigration judge does not have jurisdiction to grant them asylum. The principal applicant will need to file a Form I-730 petition for those dependents after the immigration judge grants asylum.

§ 8.3 T VISA

The T non-immigrant status (informally referred to as the “T visa”) is a form of protective relief designed for victims of human trafficking. The T visa was created by Congress in 2000 in order to strengthen law enforcement capacity to investigate and prosecute human trafficking, and also offer protection to victims.

The T visa is a nonimmigrant visa, but creates a pathway to permanent residence since visa holders are eligible to apply for permanent residence three years after the T visa is granted, or after the conclusion of prosecution for the trafficking—whichever is first. The requirements for a T visa and the process for application/adjudication are outlined below, followed by a summary of evidence to include in the filing. *See* INA § 101(a)(15)(T); 8 C.F.R. § 214.11.

The T visa applications are adjudicated by the USCIS Vermont Service Center, a centralized processing center for T, U, and VAWA claims. Though the immigration judge does not have jurisdiction to evaluate or grant a T visa claim, if a client is in removal proceedings, the lawyer should inform the immigration judge that the client is seeking a T visa and request a continuance to be placed on the status docket, or administrative closure pending its adjudication by USCIS. Early communication with the Department of Homeland Security Office of Principal Legal Advisor can also open negotiations for release from custody if the client is held in immigration detention. And, as discussed below, clients may be eligible for deferred action or continued presence, which would halt removal.

A. Eligibility for T Visa

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

- be a victim of of severe forms of trafficking, as defined by federal law;
- be in the United States on account of the trafficking;
- comply with reasonable requests to assist law enforcement;
- show that they would suffer extreme hardship involving unusual and severe harm if removed from the U.S.; and
- be admissible to the United States.

See INA § 101(a)(15)(T); 8 C.F.R. § 214.11.

1. Definition of Human Trafficking

Federal law defines “severe forms of trafficking” under two categories:

- (1) “Sex trafficking” is defined as the “recruitment, harboring, transportation, provision or obtaining of a person for the purpose of a commercial sex act where the commercial sex act is induced by force, fraud, or coercion, or the person being induced to perform such act is under 18 years of age.”
- (2) “Labor trafficking” is defined as the “recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of involuntary servitude, peonage, debt bondage, or slavery.”

**PRACTICE TIP**

2017 revisions to T visa regulations provided clarification that a “victim of severe forms of trafficking” can include instances where an individual has not actually performed labor or sex acts. For example, a victim who was recruited for trafficking and came to the United States under force, fraud, or coercion but escaped or was rescued from the situation before performing any labor or sex acts is still a “victim of severe forms of trafficking.” 8 C.F.R. § 214.11(f)(1).

2. Physically Present in the United States on Account of Human Trafficking, 8 C.F.R. § 214.11

To be eligible for a T visa, an applicant must be physically present in the United States or at a port of entry due to trafficking. An applicant is also eligible if the applicant is physically present in the U.S., American Samoa, Commonwealth of the Northern Mariana Islands, or any port of entry thereto.

**PRACTICE TIP**

Prior to the January 2017 regulatory changes, applicants who had escaped a trafficking situation prior to LEA involvement needed to establish that there was no “opportunity to depart” the United States. That is no longer necessary to establish physical presence. 81 Fed. Reg. 243, 92273 (Dec.19, 2016).

Physical presence for the purpose of this element is assessed at the time the application is filed. Regulatory changes that went into effect in January 2017 provided clarification to this vague requirement to address situations where trafficking victims may have left the United States but returned to participate in enforcement efforts, and to address victims of continuous trafficking schemes, among other victims. The new regulations provide five categories of physical presence related to human trafficking:

- individuals currently subjected to human trafficking;
- individuals liberated from human trafficking by a law enforcement agency (LEA);
- individuals who escaped the trafficking situation before LEA became involved;
- individuals subjected to human trafficking in the past and whose ongoing presence in the United States is on account of human trafficking; and
- individuals present in the United States on account of having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or perpetrator of human trafficking.

**PRACTICE TIP**

The January 2017 regulatory changes made clear that “judicial processes” does not require LEA sponsorship for entry nor is it limited to investigation or prosecution in a criminal proceeding. It also contemplates a victim being paroled into the United States in order to pursue civil remedies related to human trafficking. This can be significant, as most civil remedies have a longer statute of limitations than in the criminal context. 81 Fed. Reg. 92274 (Dec. 19, 2016).

3. Comply With Reasonable Requests to Assist Law Enforcement

In order to qualify for a T visa the applicant must comply with any reasonable request from a law enforcement agency to assist in the investigation or prosecution of human trafficking. Unlike the U visa, no formal certification is required to submit with the T visa application; however, the client must still provide evidence that the crime was reported to law enforcement, unless the applicant is under 18 years old. Reporting to the National Human Trafficking Hotline is not, by itself, sufficient. Pursuant to 2017 regulatory changes, DHS no longer applies special weight to an LEA endorsement (certification), but rather applies equal weight to primary and secondary evidence using an “any credible evidence” standard. Nonetheless, if the client has been or is cooperating with law enforcement, it is still advisable to request a certification to include with the application. Additionally, the regulations expanded the class of those agencies eligible to certify for T visas. This includes local and state law enforcement agencies as well as federal law enforcement agencies and the Department of Labor.

The updated regulations define “reasonable requests” as:

- totality of the circumstances test, 8 C.F.R. § 214.11(h)(2);
- “comparably situated crime victims” standard, not a “subjective trafficked person”;
- whether the LEA request was reasonable, now whether the victim’s refusal was unreasonable. 8 C.F.R. § 214.11(m)(2)(ii).

Note that this obligation continues through adjustment of status of the conclusion of prosecution, whichever comes first.

**PRACTICE TIP**

The regulations do not provide a clear definition of the “any credible evidence” standard applied by USCIS. For purposes of showing victimization as part of a T visa application, such evidence may include, but is not limited to: “a grant of continued presence or OTIP (Office of Trafficking in Persons) certification”; “a description of what the person has done to report the crime to an LEA or to the National Human Trafficking Hotline”; “a statement indicating whether similar records for the time and place of the crime are available”; and any evidence that the applicant made “good faith attempts” to obtain the LEA endorsement and a description of those efforts. Note that an OTIP letter is not, in itself, sufficient.

Moreover, if a criminal investigation has not yet begun or is incomplete, requesting continued presence will allow the client to access a variety of benefits, including work authorization, medical assistance, and financial assistance in exchange for their cooperation with the investigation and prosecution of the crime. See section 8.3.F.1, *infra*, for more discussion of continued presence.



CAVEAT

Assistance to law enforcement is not necessary if the applicant is under the age of 18 or is unable to cooperate due to physical or psychological trauma.

4. Suffer Extreme Hardship If Removed

The client must also demonstrate that they would suffer “extreme hardship involving unusual and severe harm” if removed from the United States. 8 C.F.R. § 214.11(b)(4). Several types of immigration benefits require variations of “extreme hardship.” The T visa standard of extreme hardship “involving unusual and severe harm” is a relatively high standard. Factors, including the age and personal circumstances of the applicant, the physical and mental trauma suffered by the applicant that “necessitates medical or psychological attention not reasonably available in the foreign country,” and the extent of the consequences of the human trafficking, are taken into consideration. See 8 C.F.R. § 214.11(i)(1)(i)–(viii). This is a non-exhaustive list of factors that may be considered. They may also consider country conditions, access to judicial remedies and other services, etc. For an in-depth review of the standard through an analysis of appeals decisions, see Virgil Wiebe & Sarah Brenes, *Mental Health Professionals and Affirmative Applications for Immigration Benefits: A Critical Review of Administrative Appeals Office Cases Involving Extreme Hardship and Mental Harm*, Immigration Briefings, No. 11-27 (2011), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1923924>.

5. Be Admissible to the United States

Certain other inadmissibility grounds apply which may make an applicant ineligible for a T visa, including health-related, criminal-related, security-related, and other miscellaneous grounds. See INA § 212(a)(3)(E), (d)(14); 8 U.S.C. § 1182(a)(3)(E), (d)(14). The T visa applicants can receive a waiver of inadmissibility, granted by the Secretary of Homeland Security, to be admissible. T visa applicants are not subject to the public charge ground.

Many grounds of inadmissibility can be waived for T visa applicants by filing a Form I-192, except:

- if the applicants have participated or committed an act of severe trafficking in persons themselves, then they are barred from being eligible. INA § 214(o)(1); 8 U.S.C. § 1184(o)(1);
- security/terrorism grounds;
- child abduction; and/or
- tax avoidance.

Applicants who are subject to these unwaivable grounds of inadmissibility may not be granted T visa, although applicants may be eligible for a waiver in the exercise of DHS discretion or in the national interest, even if an unwaivable ground applies. 8 C.F.R. § 214.11(j).

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. Note that the I-192 does have a fee (practitioners should confirm the fee amount before submitting the application, as the fee amount is subject to change). Applicants can request a waiver of such fee by filing the Form I-912 with supporting evidence of financial hardship. The authors are seeing increasing denials of these fee waiver requests, so it is crucial that the lawyer provide sufficient evidence of financial hardship or work with the client to pay the fee, especially if facing tight deadlines. Note that, while a new regulation set to go into effect on Oct. 2, 2020 would increase fees and disallow fee waivers for many categories of migrants, T visa applicants are still eligible to request fee waivers for all forms related to their T status, through naturalization.

Additionally, any applicant who does not make any contact (different from cooperation) with a law enforcement agency regarding the underlying severe form of human trafficking will be ineligible for a T visa. 58 C.F.R. § 214.11(h)(2).

B. Application Process

Applications for T visas are submitted to the USCIS Vermont Service Center. The lawyer should review the application instruction sheet for the most current address, available at the USCIS website, <www.uscis.gov/sites/default/files/files/form/i-914supbinstr.pdf>.

The application packet should include the following:

- (1) Form I-914, Application for T Nonimmigrant Status;
- (2) a personal statement detailing the client's experience as a victim of trafficking; and
- (3) evidence the client meets the eligibility requirements.



PRACTICE TIP

The authors recommend the packet include the I-192 and (if needed) I-912 at the time of filing in order to avoid a request for evidence (RFE), or that such be supplemented in the record later.



PRACTICE TIP

Though applicants are encouraged to submit Form I-914, Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons, the form is not required for a T visa application as it is in the case of a U visa. If it is not included, the applicant should provide other evidence to show she or he has complied with reasonable requests to assist law enforcement. At a minimum, this must include proof that the applicant reported the trafficking to a law enforcement agency, which can be shown by emails, phone logs, police reports, etc.

The application must include a personal statement explaining the applicant's experience as a victim of human trafficking. The personal statement must state that the



PRACTICE TIP, CONTINUED

applicant is a victim of a severe form of trafficking in persons; that the applicant is physically present in the United States on account of the trafficking; and that the applicant would suffer extreme hardship involving unusual and severe harm if the applicant were removed from the United States. It is essential that the applicant avoid any inconsistencies in recounting facts and provide detailed descriptions of the nature and the context of their suffering.

In addition, it is helpful to include a cover letter in the application. The cover letter indexes the documents included with the application, providing a roadmap for the adjudicator. The letter may also include a brief argument in support of the application. Particularly if the case is novel or complex, the attorney should brief the issues in their cover letter or be prepared to submit a supplementary brief in support.

1. Documents to Prove Applicant Was a Victim

Primary evidence (endorsement from law enforcement agency on Form I-914 Supplement B, instructions) demonstrating continued presence or secondary evidence (describing the nature and scope of force/fraud/coercion used against victim):

- **LEA endorsement as a primary evidence:** description of victimization and signature of a supervising official responsible for investigation/prosecution.
- **LEA endorsement as a secondary evidence:** original statement, credible evidence, statement indicating similar records for the time and place, must show good-faith attempts.

Each of the requirements is outlined below, followed by a summary of evidence to include in the filing. *See* INA § 101(a)(15)(T); 8 C.F.R. § 214.11.

a. Nonimmigrant Status – Adjudicated by the USCIS Vermont Service Center

- A completed application packet to the USCIS Vermont Service Center, 75 Lower Welden St., St. Albans, VT 05479.
- Include any fees or request of a fee waiver (payable to “The U.S. Department of Homeland Security”).
- Need applicant’s original signature (better to sign in blue ink—to distinguish the signature as original, instead of photocopies).
- Wait until USCIS sends an RFE before sending additional materials; though, one may choose to supplement the filing before an RFE, particularly if a certification or additional proof are obtained.
- Do not tab the files on the side or staple them—binder clips are preferred.

- Include applicant’s name and DOB or Alien Number on back of any photographs submitted.
- Use two-hole punch on top of every piece of paper submitted.
- Contact Vermont Service Center if there are questions:
 - Center’s VAWA Hotline at 1-802-527-4888 and leave a detailed message OR
 - Email HotlinefollowupI918I914.vsc@uscis.dhs.gov. Email turnaround time is typically 72 hours. It is requested that attorneys use only one of the methods.



COMMENT

T visa applications are adjudicated exclusively on the paper application. The client will not be called for an interview. If additional evidence is required, the Vermont Service Center (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 granted. The applicant will have an opportunity to respond before a final decision is issued.

C. Applicants in Removal Proceedings

Immigration judges have no jurisdiction to evaluate or grant the T visa claim, but practitioners should still inform the judge that the client is seeking a T visa and request a continuance or administrative closure pending its adjudication by USCIS. Note that at time of writing, EOIR was tightening the instances in which removal proceedings would be delayed while applications are pending before USCIS; however, there are still arguments to be made that T visa cases should be granted continuances or status docket, particularly based on the Trafficking Victims Protection Reauthorization Act (TVPRA) and the regulations.

If the applicant is in proceedings before an immigration judge (IJ) or the Board of Immigration Appeals (BIA), the applicant can request that the proceedings be administratively closed or that a motion to reopen be indefinitely continued for USCIS to decide the T visa application. *See* 8 C.F.R. § 214.11(d)(8). Pursuant to 8 C.F.R. § 1214.2(a), an immigration judge may, with the concurrence of government counsel, administratively close pending proceedings in order to allow victims of severe forms of trafficking in persons to seek T nonimmigrant status. Similarly, under 8 C.F.R. § 1214.2(b), “[a] determination by the Service that an application for T-1 nonimmigrant status is bona fide automatically stays the execution of any final order of exclusion, deportation, or removal. This stay shall remain in effect until there is a final decision on the T application.” Any family member of the principal petitioner who is seeking a derivative T visa in proceedings before an IJ or the BIA will undergo the same process. *See* 8 C.F.R. § 214.11(d)(8)–(9), (o)(8); *see also* USCIS Adjudicator’s Field Manual § 39.2(c)(1)(C). If USCIS were to deny the T visa application, then the proceedings would be reopened. *See* 8 C.F.R. § 214.11(d)(8), (o)(8).

D. Applicants with Outstanding Removal Orders

The applicant may request a stay of removal from DHS; if granted, DHS will not remove the applicant from the country until USCIS decides on the application. 8 C.F.R. § 214.11(d)(9). Once USCIS determines that the application is bona fide, USCIS undertakes a de novo review of the application and the removal is automatically stayed until the final adjudication. 8 C.F.R. § 214.11(d)(9). The status of individual cases can be obtained through contacting VSC as described above. The USCIS online Case Status System does not include information for VSC cases. If such application is denied, the stay of the removal order is then lifted effective on the date of the denial, regardless of whether the applicant files an appeal. If the application is approved, then the removal order is deemed cancelled on the approval date. 8 C.F.R. § 214.11(d)(9). Any family member of the principal petitioner who is seeking a derivative T visa who is subject to final removal orders will undergo the same process. *See* 8 C.F.R. § 214.11(d)(8)–(9), (o)(8); *see also* USCIS Adjudicator’s Field Manual § 39.2(c)(1)(C). If an applicant has been granted continued presence or deferred action, their removal will be stayed for the duration—and any extension thereof—of that status.

E. Benefits

Once the T visa application has been approved, T status is granted for four years, allowing the client to stay in the United States during this time. 8 C.F.R. § 214.11(p)(1). This time period could be extended if: “a Federal, State, or local law enforcement official, prosecutor, judge, or other authority investigating or prosecuting activity relating to human trafficking or certifies that the presence of the alien in the United States is necessary to assist in the investigation or prosecution of such activity;” or the Secretary of Homeland Security determines that an extension is warranted due to exceptional circumstances; or the child eligible for relief under INA § 245(I)/8 U.S.C. § 1255(I) and “is unable to obtain such relief because [implementing] regulations have not been issued.” INA § 214(o)(7)(A)–(B); 8 U.S.C. § 1184(o)(7)(A)–(B).

The Form I-539 should be filed before the T nonimmigrant status expires but no more than 90 days before expiration. However, if the client can explain in writing why they are filing the Form I-539 after the T nonimmigrant status has expired, USCIS has discretion to grant, on a case-by-case basis, an extension based on an untimely filed Form I-539.

Even before a T visa is granted, the Office of Refugee Resettlement (ORR) of the Department of Health and Human Services (HHS) can offer a letter of eligibility entitling the petitioner to multiple protections. *See* 22 U.S.C. § 7105(a)–(b). If the survivor is under the custody of the federal government, they must not be detained in facilities inappropriate to their status as a crime victim; must receive necessary medical care and assistance; and must be provided protection if their safety is at risk. 22 U.S.C. § 7105(c)(1). Furthermore, the survivor must have access to information about their rights and translation services and to the extent practicable, information about federally funded or administered anti-trafficking programs. 22 U.S.C. § 7105(c)(2).

F. Adjustment of Status for T Visa Holders

T visa holders are eligible for permanent residence three years after being granted, or after the completion of the prosecution or investigation of the crime, whichever is first. They are immediately issued work permits upon receiving the T visa grant. In addition, T visa applicants may be eligible to receive certain federally-funded benefits even before a T visa application is filed, once they receive certification from the United States Department of Health and Human Services (HHS) and the Office of Refugee Resettlement (ORR). These benefits are distinct from the T visa nonimmigrant status. If the victim is under 18 years of age, they are eligible for some benefits without the need for certification.

T-1 nonimmigrant holders may file Form I-485 only after they have been in the United States for the following time period, whichever is less:

- a continuous period of at least three years since the client was first admitted as a T-1 nonimmigrant; or
- a continuous period during the investigation or prosecution of acts of trafficking, and the Attorney General has determined the investigation or prosecution is complete.

Derivative applicants (T-2 through T-6 nonimmigrant) may file Form I-485 only once the principal applicant has met the above physical presence requirement.

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 T-Visa holders includes:

- evidence the client was lawfully admitted in T nonimmigrant status and continues to hold such status at the time the Form I-485 is filed; and
- evidence that adjustment of status is warranted as a matter of discretion.

Principal applicants must also submit:

- evidence of continuous physical presence;
- evidence of good moral character; and
- evidence that the client complied with reasonable requests for assistance in the investigation or prosecution of the acts of trafficking, or evidence that the client would suffer extreme hardship involving unusual and severe harm upon removal from the United States, or evidence that the client was under 18 years of age at the time of the victimization that qualified the client for T nonimmigrant status.

1. Continuous Presence and Travel

The following must be submitted:

- copies of every page of all passports or equivalent travel documents that were valid while in T-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 T-1 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.

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-914B stating that:

- the absence was necessary in order to assist in the investigation or prosecution of acts of trafficking; or
- an official involved in the investigation or prosecution of acts of trafficking certifies that the absence was otherwise justified.



PRACTICE TIP

T-1 nonimmigrants can file for adjustment of status prior to accruing three years of continuous physical presence since they were first admitted as a T-1 nonimmigrant if they can provide evidence that the investigation or prosecution is complete. This evidence may include a document signed by the Attorney General of the United States (or designee) stating that the investigation or prosecution is complete. The attorney can also request a letter from the Department of Justice Civil Rights Division by emailing the department at T-Adjustment.Cert@usdoj.gov and including the client's name, alien number, the date the T visa was granted, location and approximate dates of trafficking, law enforcement contact where case was reported, and information about any prosecution, including any correspondence with law enforcement or prosecution.

Evidence establishing continuous physical presence may include, but is 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; and

- the client’s affidavit attesting to the continuous physical presence. If the client does not have documentation to establish continuous physical presence, the client 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.

2. Ongoing Compliance with Requests for Assistance

The attorney must submit evidence that shows that the client:

- (1) was under 18 years of age at the time of the victimization that qualified for T nonimmigrant status;
- (2) would suffer extreme hardship involving unusual and severe harm if removed from the United States; or
- (3) complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking, including but not limited to:
 - a newly executed Form I-914, Supplement B, T Nonimmigrant Status Certification;
 - a photocopy of the original Form I-914, 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 how the client continues to comply with any reasonable requests; and
 - if the client assisted law enforcement when they received the T visa but is no longer assisting law enforcement, the client should include an affidavit describing why the cooperation is no longer necessary. Some reasons may include:
 - the investigation or prosecution is complete;
 - the T-1 nonimmigrant status is based on willingness to assist but the client was not needed, and that the client continues to be willing to assist but the assistance is still not needed;
 - the client was not asked to assist after being granted T-1 nonimmigrant status;
 - a request to assist was not reasonable pursuant to 8 C.F.R. § 214.11(a); or
 - the client was not subject to the compliance requirement due to age or severe trauma at the time of trafficking.

3. Extreme Hardship

Clients may also submit evidence that they will suffer extreme hardship involving unusual and severe harm if they are removed from the United States. If the attorney plans to provide this evidence, here are a few considerations:

- USCIS may consider both traditional extreme hardship factors and the factors associated with having been a victim of a severe form of trafficking in persons.
- Economic harm or the lack of or disruption to social or economic opportunities is generally insufficient to meet the standard.
- Relevant country condition reports or any other public or private documents may also support a hardship claim.
- USCIS will only consider factors that show hardship to the principal applicant, not to other people or family members. See 8 C.F.R. § 214.11(i) for a list of factors.



CAVEAT

Though USCIS is not bound by its previous extreme hardship determination, if the basis of the current extreme hardship claim is a continuation of the extreme hardship claimed in the application for T-1 nonimmigrant status, the attorney does not need to re-document the entire claim. Instead, submit evidence to establish that the previously established extreme hardship is ongoing.

4. Discretion

A T 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 (for more details, go to the “Additional Instructions for Human Trafficking Victims and Crime Victims” section in the Instructions for Form I-485).

G. Dependents

Besides the direct victim of the human trafficking, their family members may obtain “derivative” T visas if accompanying the principal T visa petitioner. INA § 101(a)(15)(T)(ii)(I)–(III); 8 U.S.C. § 1101(a)(15)(T)(ii)(I)–(III). If the principal applicant (T-1 petitioner) or the trafficking survivor is under 21 years of age at the time of their filing of the application to USCIS, then their spouse (T-2 visas), children (T-3 visas), parents (T-4 visas), and siblings who are unmarried and under the age of 18 (T-5 visas) may be eligible for derivative T nonimmigrant status. INA § 214(o)(5); 8 U.S.C. § 1184(o)(5); INA § 101(a)(15)(T)(ii)(I)–(III); 8 U.S.C. § 1101(a)(15)(T)(ii)(I)–(III). Additionally, parents, siblings under 18 years old, and children of any age or marital status of other qualifying relatives that face “present danger of retaliation” as a result of either the derivative applicant’s escape from the human trafficking or from the cooperation with the law enforcement, may also be eligible for derivative T nonimmigrant status (T-6 visas). 8 C.F.R. § 214.11(k)(6). The family member seeking a derivative T

visa must demonstrate that either the principal applicant or the family member seeking derivative status would suffer extreme hardship if that family member would be denied admission or removed from the United States. Furthermore, the necessary relationship between the family member seeking derivative status and the principal applicant must exist when the original petition was filed and must continue to exist until the family member is admitted. 8 C.F.R. § 214.11(o)(4). Additionally, unlike T-1 visas, there is no cap or limitation on the number of T-2, T-3, T-4, or T-5 visas available annually. INA § 214(o)(2)–(3); 8 U.S.C. § 1184(o)(2)–(3).



PRACTICE TIP

Carefully review age-out issues for derivatives to ensure filing of the principle applicant's T visa, which will lock-in derivative ages. Additionally, counsel should review derivative processing before filing for adjustment of status for the principle applicant (T-1).

H. Appeals

If the client's T visa application has been denied, any appeal must be taken to the Administrative Appeals Office (AAO) of DHS. If the petitioner believes that the law was applied inappropriately or has additional information, they may file a motion to reconsider or a motion to reopen with the AAO. *See* 8 C.F.R. § 103.5. All motions must include a Form I-290B, Notice of Appeal or Motion (instruction) with a filing fee and must be filed within 30 days of the initial denial. 8 C.F.R. § 103.5(a)(1)(i); *see also In re Applicant (Name Redacted)*, No. EAC 06 220 50603, 2009 WL 3065611 (Admin. App. Office, June 5, 2009). A brief and additional evidence may be submitted within the 30 days following the I-290B. Initially, USCIS will review the appeal and determine whether to grant the benefits requested, but if the appeal is not granted at USCIS, it will forward the appeal to the AAO for appellate review. *See* USCIS, The Administration Appeals Office (AAO), *available at* <<https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao>> (outlining the AAO appeal process). The appellate review will likely be completed within six months of when the AAO receives the appeal. *Id.*

I. Revocation

Attorneys should advise clients that approved T visa status could be revoked. If the T nonimmigrant violates any requirements of the T visa eligibility or if the approval of the application violates 8 C.F.R. § 214.11 or involves error during the process that affected the outcome of the application, the T visa may be revoked. 8 C.F.R. § 214.11(s)(1)(i)–(ii). Additionally, if the petitioner is 18 years or older and if the law enforcement agency involved in investigating or prosecuting the traffickers reports to USCIS with a detailed explanation that the petitioner has unreasonably refused to cooperate, or if the law enforcement agency withdraws or disavows its endorsement with a detailed explanation to USCIS, this could be a ground for revocation of approved T nonimmigrant status. 8 C.F.R. § 214.11(s)(1)(iv)–(v). The petitioner must notify USCIS of any changes in the terms and conditions of their conditions that may affect eligibility of the T nonimmigrant status. 8 C.F.R. § 214.11(s). If the principal T-1 immigrant's status is revoked, all family members who have derivative T nonimmigrant status from the T-1 will have their status revoked automatically, even if the applications are still being adjudicated. 8 C.F.R. § 214.11(s)(5). The revocation of the T visa status will not have any effect on the annual 5000 cap as described above.

§ 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.

A. Eligibility Requirements and State Court Process

1. Child Must be Under 21 Years of Age at the Time the Application is Filed

The child must be under 21 years of age at the time the application for special immigrant juvenile status is filed. *See* 8 C.F.R. § 204.11(c)(1); USCIS Policy Manual, section on Special Immigrant Juvenile Status.



PRACTICE TIP

Though the age limit is 21 years of age, most state court proceedings in Minnesota that establish dependency of the juvenile are not accessible after the child turns 18. As such, the attorney should work swiftly to pursue the state court findings if the child has already reached the age of 17. However, in certain Minnesota “dependency” proceedings, such as proceedings for a child in need of protective services (CHIPS), jurisdiction over the child as a juvenile can extend beyond the age of 18 and the child could possibly obtain the required predicate order after the child has turned 18, but federal law requires that the child obtains the predicate order before reaching the age of 21. As such, it is important to carefully review the relevant statutes and procedures governing the state court proceeding in which the client will be pursuing both relief from the state court and the requisite predicate order. It is also highly recommended that the attorney partner with a mentor familiar with the type of state court proceeding in which the client is seeking special findings.



ETHICAL CONSIDERATIONS

Some lawyers are retained to file both the state court pleadings and the immigration applications. In Minnesota, many state court petitions are brought by an adult seeking a finding on behalf of a juvenile, and therefore, handling both proceedings would require representation of multiple parties. Under these circumstances, the lawyer should consider ethics rules related to conflicts of interests and representation of multiple parties. The Volunteer Lawyers Network (VLN) has a program set up to provide legal services to a parent seeking sole custody of a child or to other adults seeking third-party custody in the state court proceedings, for families that income qualify for their services. If the attorney represents both the proposed custodian and the child eligible for SIJS, they will want to ensure that they have discussed carefully with the clients at the time representation begins how any conflicts of interest would affect representation. The attorney may also want to ensure both parties review, understand, and sign a dual representation waiver that memorializes the discussion about the impact on representation in the case of conflicts of interest.



EDITOR'S COMMENT

The Deskbook Editors second the author's recommendation regarding examination of conflict of interest and use of the VLN. One Editor had a recent SIJS case in which the juvenile's adult sister was going to need to file a third-party custody petition in district court. After careful reflection on the ethical issues, the Editor decided not to handle the third-party petition, but needed a referral that was not only trustworthy but also could render pro bono representation to the adult sister. Fortunately, VLN was able to place the adult sister with a pro bono attorney volunteer to handle the third-party custody matter. VLN is a valuable resource and should be seriously considered by the lawyer in these types of situations.

2. The Child Must be Unmarried

The child must be unmarried. *See* 8 C.F.R. § 204.11(c)(1).



PRACTICE TIP

Unmarried children include children who are divorced or widowed. Because the SIJS process can take many years, it is encouraged that the attorney representing a child seeking SIJS classification discuss this requirement with the client, and reiterate the requirement to older children. Children who may have children of their own are not restricted from receiving SIJS. However, children who marry at any time before receiving SIJS will become ineligible for SIJS. The child must remain unmarried until granted permanent residency based on the SIJS application. If the child married prior to receiving SIJS, the petition will be denied. If the child marries before becoming a permanent resident, the status will be revoked. However, note that the requirement is that the child be "unmarried," not "never married." As such, a divorced child could qualify for SIJS. For more information, it is suggested that practitioners review the Immigrant Legal Resource Center's *Manual on Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, an excellent resource for practitioners working on these cases.

The child must be under the jurisdiction of a juvenile court. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11(a), (c).

This information was provided via the Immigrant Legal Resource Center's *Manual on Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, an excellent resource for practitioners working on these cases. *See* Angie Junck, Alison Kamhi & Rachel Prandini with Kristen Jackson & Helen Lawrence, *Special Immigrant Juvenile Status and Other Immigration Options for Children and Youth*, Immigrant Legal Resource Center (Mar. 20, 2015), available at <<https://www.ilrc.org/publications/special-immigrant-juvenile-status-0>>.

3. The Child Must be Under the Jurisdiction of a State Juvenile Court

The child must be under the jurisdiction of a juvenile court. *See* INA § 101(a)(27)(J); 8 C.F.R. § 204.11(a), (c).

The regulations broadly define “juvenile court” to include any court that has jurisdiction under that state’s law to “make judicial determinations about the custody and care of juveniles.” *See* 8 C.F.R. § 204.11(a). Minnesota law provides this jurisdiction to courts handling a variety of proceedings, including family court custody actions, juvenile delinquency proceedings, adoption proceedings, juvenile court CHIPS proceedings, and probate guardianship actions. *See Matter of the Welfare of D.A.M.*, No. A12-0427, 2012 WL 6097225, at *5 (Minn. Ct. App. Dec. 10, 2012).



CAVEAT

The child must remain under the jurisdiction of the juvenile court until the SIJS application is adjudicated; however, under the *Perez-Olano* settlement agreement, there may be an exception to the continuing jurisdiction requirement if juvenile court jurisdiction terminates because of age. *See also* Trafficking Victims Protection Reauthorization Act (TVPRA) § 235(d)(6). The USCIS Policy Manual provides guidance consistent with the *Perez-Olano* settlement and the TVPRA, indicating that, so long as “[t]he petitioner was the subject of a valid order that was terminated based on age before or after filing the SIJ petition (provided the petitioner was under 21 years of age at the time of filing the SIJ petition),” USCIS will not find the order invalid for lack of continuing jurisdiction. However, this policy based on the *Perez-Olano* settlement agreement contains sunset provisions. While these protections for SIJS-eligible children from aging out of status if the courts’ jurisdiction ends based on age are still protected under the TVPRA, it is advised as a best practice that the I-360 petition be filed with USCIS so that it arrives before the state court’s jurisdiction over the child terminates based on age.

If the child is already under the jurisdiction of a state court through juvenile delinquency or CHIPS proceedings, the immigration lawyer should consult with the child’s lawyer in these proceedings to seek the requisite findings. More commonly, the lawyer will need to initiate a state court action.

The state court must also make the below special findings in an order that complies with the requirements laid out in the USCIS Policy Manual.

4. Special Findings in State Court

In order to be eligible to apply for SIJS status with USCIS, the court must include the following special findings as part of its order in whichever proceedings are appropriate for the child’s situation. The findings are made based on testimony, documentary evidence, and in some cases, briefing. Some types of proceedings, such as those involving a petition for sole custody by a parent or third-party custodian, require that someone other than the child file the state court petition. However, the lawyer representing the child should be involved in development of these documents, regardless of whether the lawyer is also representing the custodian. In some cases, the lawyer representing the child will draft an affidavit including the child’s testimony providing the relevant facts related to abuse, abandonment, and neglect, inability to reunify with one or both parents, and the best interests of the child. An affidavit

from the child might be needed in cases where the proposed custodian is unaware of the facts forming the basis for allegations of abuse, abandonment, and/or neglect, and that testimony must come from the child. Affidavits from children are not a regular part of Minnesota state court custody proceedings, and are not needed in every SIJS case. Where such an affidavit is sought, it is best that this affidavit be drafted by the child's immigration attorney. Having this affidavit be drafted by the child's attorney has the advantage of avoiding re-traumatization of the child, avoiding conflicts of interest, and ensuring that the adjudicator is fully informed regarding the facts supporting the child's eligibility to receive the relief requested from the state court as well as the requisite predicate order. The child's lawyer also should review the pleadings and proposed order before the attorney appearing in state court submits these documents in order to ensure that the facts alleged in those documents are consistent with any other filings the child's attorney may have made with USCIS or the immigration court on the child's behalf, and to ensure that the request for the predicate order is properly presented per the requirements of USCIS.

The lawyer should keep in mind, and remind the court as necessary, that all special findings requested are made by applying relevant state law to the facts presented in a particular case and that the state court findings do not confer SIJS status to the child.



PRACTICE TIP

If the state court attorney is appearing before an adjudicator unfamiliar with SIJS and requests for special findings, the attorney may need to educate the court on SIJS. In addition to filing a brief outlining the requirements for SIJS and relevant Minnesota case law, the attorney may consider providing or citing to resources created for state courts assessing requests for special findings. The American Bar Association has published a helpful *Guide for State Court Judges and Lawyers on Special Immigrant Juvenile Status* that clarifies the state court's role in the process, available at the ABA website, [www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/->](http://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/mar-apr-2017/a-guide-for-state-court-judges-and-lawyers-on-special-immigrant-/).

USCIS has exclusive authority to grant or deny SIJS status. The attorney appearing in state court should speak with experienced local practitioners to determine whether a particular adjudicator is already familiar with SIJS and take steps to educate the adjudicator if necessary on the role of the state court in the SIJS process, such as filing a memorandum of law citing to relevant Minnesota case law on SIJS.

Finding 1: The child suffered abuse, neglect, and/or abandonment (or similar basis under the law) that makes reuniting the child with one or both parents not viable. *See* INA § 101(a)(27)(J)(i).



PRACTICE TIP

The 2008 amendments to the TVPRA reaffirmed eligibility based on abuse by one parent only. Single-parent claims are most commonly filed as part of a custody petition for sole custody.

**PRACTICE TIP**

Abuse, abandonment, and neglect are evaluated based on their definitions under the state law of the state making the findings in the predicate order, rather than any definition under federal law. Thus, a Minnesota court would apply Minnesota law to the facts in a particular case to evaluate whether to issue the requested predicate order.

**PRACTICE TIP**

The SIJS statute permits attorneys to seek SIJS findings based on a “similar basis under state law” to abuse, abandonment and/or neglect. The USCIS Policy Manual Vol. 6, Part J, Chapter 3.A.1 states that “[i]f a juvenile court order makes the determinations based upon a state law similar to abuse, neglect, or abandonment, the petitioner must establish that the nature and elements of the state law are indeed similar to the nature and elements of laws on abuse, neglect, or abandonment.” Some practitioners have reported that it has been difficult to establish to USCIS’ satisfaction that, where a state court found a “similar basis under state law” was present, that “similar basis” was sufficiently similar to abuse, abandonment, or neglect to meet the requirements of the INA. Thus, practitioners should always ensure that there are facts presented in their state court filings that meet the Minnesota state law definition of abuse, abandonment and/or neglect, in addition to any “similar basis under state law” they might alleged.

Finding 2: It is not in the best interest of the child to be returned to their country of origin or nationality, or their parents’ country of origin or nationality. *See* INA § 101(a)(27)(J)(ii).

**PRACTICE TIP**

The USCIS Policy Manual Vol. 6, Part J, Chapter 3.A.2 states that “the order (or orders) should use language establishing that the specific findings (conclusions of law) were made under state law. The order (or orders) should not just mirror or cite to immigration law and regulations.” As such, it is recommended that the lawyer drafting the proposed predicate order cite only to state law and not to federal law.

The Policy Manual also suggests that the finding that it is not in the best interest of the child to be returned to their country of origin or nationality combines the analysis of who would be the ideal caregiver for the child with an analysis of other relevant factors relating to the child’s best interests under state law. The Manual states that “the court’s finding that a particular custodial placement is the best alternative available to the petitioner in the United States does not necessarily establish that a placement in the petitioner’s country of nationality would not be in the child’s best interest.” As such, the attorney seeking the predicate order should include facts in the record specifically



PRACTICE TIP, CONTINUED

establishing why it would not be in the child's best interest to return to their country of origin, in addition to addressing why the proposed custodial placement or dependency arrangement would be in the child's best interest. The attorney should also ensure that the proposed predicate order specifically contains a factual basis both for the proposed placement/dependency arrangement and for the finding that it would not be in the child's best interests to return to their country of origin or nationality.



PRACTICE TIP

It is important to ensure that a brief factual basis for each finding is included in the predicate order signed by the state court adjudicator. As part of its review of the child's subsequent application for SIJS to USCIS, the USCIS adjudicator looks at the court's order to determine that the child sought the juvenile court order for the purpose of relief from abuse, neglect and/or abandonment. USCIS defers to the state court in its interpretation of state law. USCIS indicates in its Policy Manual that "nothing in USCIS guidance... should be construed as instructing juvenile courts on how to apply their own state law. Juvenile courts should follow their state laws on issues such as when to exercise their authority, evidentiary standards, and due process." See, e.g., USCIS Policy Manual Vol. 6, Part J, Chapter 3.A.1. However, for USCIS to conduct its review and exercise consent, USCIS looks to see whether the order includes a "reasonable factual basis" for each finding. As such, it is recommended that a summary of the facts that support each finding immediately follow that finding in the predicate order. This will require the state court attorney to include more detail than might typically be contained in a proposed order to a state court judicial officer.

For children in removal proceedings, it is recommended that all facts submitted to the family court be compared with the record of the child's interview with Border Patrol (called the Form I-213) to ensure that any inconsistencies are addressed. See further information in section 8.5.B, Federal Immigration Process, *infra*.

In general, it is important to note that the USCIS adjudicators carefully review records of the child's border interview (especially Form I-213) and any other documentation submitted to USCIS (such as applications for other forms of immigration relief). Additionally, USCIS can schedule the child for an interview related to their SIJS petition (although this is rare since adjudications are now centralized in the National Benefits Center). As such, it is very important that the facts as presented to the family court fully reflect the attorney's own thorough interview of the child and are consistent other documentation to which USCIS may have access.

Finding 3: The child must be declared dependent on the juvenile court or have been legally committed to or placed in the custody of a state agency or department, or an individual or entity declared by the court.

The lawyer should note that “custody of the state” includes being in the custody of an individual appointed by a state or juvenile court. *See* INA § 101(a)(27)(J)(i).

B. Federal Immigration Process

Once the lawyer obtains the state court order with the necessary special findings, the child is eligible to apply for SIJS with the USCIS. If the child is not in removal proceedings and has a visa currently available permitting the child to adjust their status, the lawyer may be able to file an application for permanent resident status (Form I-485) together with the SIJS petition (Form I-360) (known as a “one-step” application). Both applications are available on the USCIS website, <www.uscis.gov>.

Generally, if the child is not in removal proceedings at the time of filing and adjudication of their application and has a visa immediately available allowing the child to adjust their status, the lawyer may file a one-step application. All qualifying special immigrant juveniles are considered by law to have been paroled into the United States, and thus do not have to provide their lawful entry or admission to the United States as do many other applicants for adjustment of status. *See* INA § 245(h). This permits these children to immediately apply for adjustment of status without having to pursue a waiver for unlawful entry or pay a fine related to an unlawful entry as is required for some other types of adjustment of status applications.

If the child is in removal proceedings, or does not have a visa immediately available, the lawyer must file a standalone SIJS petition with USCIS. The regulations give the immigration judge exclusive jurisdiction over the I-485 adjustment application for a non-arriving alien. *See* 8 C.F.R. § 1245.2(a)(1). The lawyer may request that the removal proceedings be continued, administratively closed or terminated while the lawyer is pursuing the SIJS petition. Several recent BIA and Attorney General decisions impact the availability of administrative closure and termination of proceedings and the arguments attorneys must make to seek continuances of proceedings for purposes of SIJS adjudication. Attorneys representing special immigrant juveniles in removal proceedings must ensure that they are familiar with this case law and are addressing it in any requests they make of the court for additional time their client may need for their application to be adjudicated.



COMMENT

Recent decisions by the BIA and Attorney General are available at the U.S. Department of Justice website, <www.justice.gov/eoir/ag-bia-decisions>.

Once SIJS is approved, the lawyer may request that the court terminate proceedings in order to file the permanent residence application with USCIS. The motion to the immigration court should explain whether the child has an immediately available visa allowing the child to adjust status. The motion should explain why termination is an effective court docket management tool and appropriate given the findings that the child qualifies for the protection of SIJS. Given recent BIA case law governing termination of proceedings, the court may in some cases decline to grant the motion for termination of proceedings. If this occurs, the child’s attorney should be prepared to request a brief individual hearing for the immigration judge to review and adjudicate the child’s application for adjustment of status. If the child is pursuing adjustment of status before the immigration court and is not eligible for a fee waiver, the child will need to pay the application fee to USCIS and provide proof of payment to the immigration court. For instructions on this process, see the USCIS website, <www.uscis.gov/sites/default/files/files/article/PreOrderInstr.pdf>. To determine whether the client will qualify for a fee waiver based on their household income, see the USCIS

Fee Waiver Instructions, available at <www.uscis.gov/i-912>, and the 2020 HHS Poverty Guidelines applicable to I-912 fee waiver requests, available at <www.uscis.gov/i-912p>. For more on motions before the immigration court, see the Immigration Court Practice Manual at <<https://www.justice.gov/eoir/office-chief-immigration-judge-0>>, which is publicly available online, and consult with local immigration practitioners.

**PRACTICE TIP**

For a child in removal proceedings, jurisdiction over the I-485 permanent resident (adjustment) application remains with the immigration court. The lawyer may seek termination of the removal proceedings in order for USCIS to adjudicate the adjustment application. The immigration court will often continue proceedings while the lawyer is pursuing the I-360 SIJS petition. Once granted, a new motion is required to fully terminate proceedings.

**CAVEAT**

If the client is an arriving alien, USCIS will have jurisdiction over the I-485 application regardless of whether the removal proceedings are terminated. See 8 C.F.R. § 1245.2(a)(1).

**PRACTICE TIP**

With some exceptions, an individual who enters the country without inspection cannot adjust status to permanent residence from within the United States. They must apply for an immigrant visa at a United States Consulate abroad. Children who receive SIJS status are able to adjust status even if they entered the United States without inspection or were apprehended upon entry. This is because an application for SIJS status effectively paroled the child into the United States for purposes of pursuing the adjustment of status application. See INA § 245(h); 8 U.S.C. § 1255(h); 8 C.F.R. § 245.1(e)(3).

See Chapter 2, Permanent Residency Through Family-Based Applications, for information on the adjustment of status process, generally.

One-step applications that include both the SIJS petition and the adjustment application need to include the following with the application:

- Form G-28, Notice of Entry of Appearance as Attorney;
- cover letter and brief case history;
- Form I-360, Self-Petition;

- Form I-485, Application for Adjustment of Status;
- state court order with SIJS special findings;
- birth certificate or other proof that the child is under 21 years of age;
- Form I-693 Civil Surgeon Medical Exam Results in a sealed envelope;
- Form I-765, Application for Employment Authorization;
- filing fee or fee waiver request with supporting documentation; and
- two passport-style photographs.

**PRACTICE TIP**

Attorneys must remember that any documents provided in a language other than English, such as birth certificates or other identity documents, must be accompanied by a translation into English, accompanied by a certificate of translation signed by the translator.

Depending on the situation of the client, the attorney may also file the following forms:

- Form I-912, Request for a Fee Waiver (which would allow the client to seek a waiver of USCIS' filing fee, depending on their financial situation).
- Form I-601, Application for Waiver of Grounds of Inadmissibility (if the client needs to seek a waiver of grounds of inadmissibility that are waivable for special immigrant juveniles but not automatically waived). For more about assessing relevant grounds of inadmissibility, see section 8.5.D, *infra*.

**PRACTICE TIP**

As application forms, fees, filing locations, and supporting documentation requirements change frequently, the lawyer should always review the most current instructions for the form associated with the application on the USCIS website, <www.uscis.gov/forms>.

After the application is filed, the child and lawyer will receive a receipt confirming the application is pending. Children over 14 years of age will be sent an appointment notice to have fingerprints and photographs taken for a background check. USCIS is required by federal statute to adjudicate I-360 petitions within six months of filing. Since adjudication of SIJS applications has shifted from local USCIS offices to the USCIS National Benefits Center, interviews prior to SIJS classification have become uncommon where an application for adjustment of status is not concurrently filed. However, if the child is scheduled for an interview, the lawyer should be prepared to defend the merits of the state court petition and remind the adjudicator of the special expertise of the state court to adjudicate the

state court claim. The language of the USCIS Policy Manual regarding the proper role of the state court and of the USCIS adjudicator in exercising USCIS consent will assist the lawyer in this respect. The lawyer should prepare the child to answer questions regarding how the child entered the United States and with whom the child now resides. If the child is in removal proceedings, the lawyer should review Form I-213 and prepare the child to address any discrepancies that may exist. A decision will be mailed to the child and lawyer following the interview. If the child is approved on both the SIJS petition and the petition for adjustment of status, the child immediately becomes a permanent resident. If the child follows all the applicable rules and waits the requisite period of years, the child will then be eligible to become a U.S. citizen.



CAVEAT

The child's immigration and custody status will affect the type of application that is filed:

Immigration Status	Custody Status	Effect on Filing
Not in removal proceedings	Not in custody of the Office of Refugee Resettlement (ORR)	I-360 and I-485 can be filed together ("one-step").
In removal proceedings	Not in ORR custody	File stand-alone I-360 with USCIS. If approved, I-485 can be filed with immigration judge or the lawyer can request that removal proceedings be terminated to file I-485 with USCIS. Please note that the child will only be able to file for adjustment of status with either adjudicator once an EB-4 visa is available. Depending on the child's country of origin, there may be a waiting period. Please see section 8.5.C., <i>infra</i> , for more information.
In removal proceedings	In ORR custody	Lawyer must seek "specific consent" from the HHS to determine/change custody status or placement of the child. See INA § 101(a)(27)(J)(iii)(I).

C. Visa Availability and Backlog Issues

For SIJS applicants, there are quotas on the number of applicants from each country of origin that can apply for adjustment of status each year. The Department of State publishes a list of the status of these quotas in the *Visa Bulletin*, which is available at their website, <<https://travel.state.gov>>. Special immigrants are classified as employment-based Fourth Preference visas. There are two sets of dates listed for each type of visa in the *Visa Bulletin*: the “Final Action Date” and the “Dates for Filing.” In deciding whether to accept adjustment of status applications, USCIS can interpret the information in the *Visa Bulletin* in two different ways. USCIS publishes a notice on its website each month telling applicants how they will interpret the *Visa Bulletin* that month. The chart is available at the USCIS website, <<https://www.uscis.gov/visabulletininfo>>. Sometimes, USCIS will only accept applications for adjustment of status based on the “Final Action Date” listed in the *Visa Bulletin* for each category of visa. Other times, USCIS will accept applications based on the “Dates for Filing” applications. If USCIS is accepting applications based on the “Dates for Filing” chart, this permits applicants to submit an adjustment of status application to USCIS even though USCIS may not be able to issue a decision on that application until more visas become available. Therefore, in determining whether a visa is available allowing the child to seek adjustment of status, the child’s attorney must review both the *Visa Bulletin* and the USCIS notice about how it will interpret the visa bulletin that month.

In the *Visa Bulletin*, “C” stands for current. This means that children from that country can immediately apply for adjustment of status. If a date is listed for the child’s country, that means that the child cannot adjust their status until the priority date (listed on their SIJS approval notice) is after the date listed on the chart. For children from El Salvador, Honduras, Guatemala, and Mexico, there are currently more applications for adjustment of status based on SIJS than available visas. As such, these children have to wait to apply until their priority date becomes current or USCIS changes how it accepts applications.

D. Grounds of Inadmissibility

Before agreeing to represent a child seeking SIJS, clients should be carefully screened to determine if any grounds of inadmissibility apply which could impact their ability to adjust status based on SIJS.

Several grounds of inadmissibility do not apply to apply to special immigrant juveniles applying for adjustment of status. *See* INA § 245(h)(2)(A). No waiver application need be submitted for these grounds to be waived. They are:

- INA § 212(a)(4), public charge;
- INA § 212(a)(5)(A), labor certification;
- INA § 212(a)(6)(A), aliens present without admission or parole;
- INA § 212(a)(6)(C), misrepresentation, including false claim to U.S. citizenship;
- INA § 212(a)(6)(D), stowaways;
- INA § 212(a)(7)(A), immigrants who seek to enter the U.S. without a valid travel document;
- INA § 212(a)(9)(B), aliens who are unlawfully present: three- and ten-year bar.

For more information on these grounds of inadmissibility and the specific conduct waived, please review the Immigrant Legal Resource Center’s Manual, *Special Immigrant Juvenile Status and other Immigration Options for Children and Youth*, or consult with an expert in the field.

Some grounds do apply, but are waivable:

- health-related grounds;
- prostitution and commercialized vice;
- association with a terrorist organization;
- failure to attend removal proceedings; and
- certain aliens previously removed.

USCIS may waive these grounds of inadmissibility for humanitarian purposes, family unity, or when otherwise in the public interest. INA § 245(h)(2)(B).



CAVEAT

INA § 245(h)(2)(B) specifically excludes consideration of the client's relationship to their natural parents or prior adoptive parents when considering whether or not the client is eligible for a waiver of one of the grounds.

Finally, there are grounds of inadmissibility that do apply and cannot be waived:

- conviction of certain crimes;
- multiple criminal convictions;
- controlled substance traffickers;
- entrance for the purpose of engaging in espionage;
- terrorist activities;
- serious adverse foreign policy consequences; and
- participation in torture, genocide, or Nazi persecution.



PRACTICE TIP

The lawyer should keep in mind that juvenile adjudications are not criminal convictions for immigration purposes; however, they may trigger conduct-based grounds of inadmissibility (i.e., drug use/abuse). The lawyer should review any juvenile records as well as any health records if the child is or was previously in ORR custody. See *Matter of Devison*, 22 I&N Dec. 1362, 1365 (BIA 2000); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of C-M-*, 5 I&N Dec. 327 (BIA 1953).

E. Dependents

There is no provision that prohibits clients who adjust status based on an approved SIJS petition from including their own biological or adopted children as derivatives on their I-485 application. Since an applicant must be unmarried to receive SIJS status, there is no eligibility for a spouse to receive dependent benefits.



CAVEAT

Beneficiaries of SIJS petitions who adjust status under INA § 245(h) are barred from ever filing family petitions for biological or prior adoptive parents.

F. Denials and Appeals

If the SIJS petition is denied, the lawyer can appeal the decision to the Administrative Appeals Office. If the permanent residence application is denied, there is no direct appeal; however, the application can be renewed with the immigration judge initially filed with USCIS, if the child is referred to the court or is already in removal proceedings.

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.

