



# PROS AND CONS OF APPLYING FOR A U VISA

By Veronica Garcia and Ariel Brown

There are many benefits to applying for U nonimmigrant status (the “U visa”), a form of relief for victims of qualifying criminal activity. Even though eligibility turns on an unfortunate event, having been the victim of a crime, the U visa’s relatively generous waiver provisions can make it one of the few immigration options available to those barred from most other relief. For instance, issues like a prior removal order, the “permanent bar,” and most criminal convictions do not categorically disqualify a person from applying for a U visa, even if such issues will still factor into discretion as part of the decision to grant or deny. This can make the U visa a good option—sometimes the only option—for many people.

The U visa provides temporary lawful status, employment authorization, and protection from removal, as well as a pathway to a green card and the ability to help family members obtain immigration status. It also confers other, collateral benefits: U visa applicants are protected by special confidentiality provisions that prevent disclosure of their information, may be eligible to apply for state public benefits programs, and are no longer prevented from renewing Deferred Action for Childhood Arrivals (DACA) once they receive deferred action through the U process. Recent developments have added to the reasons why submitting a petition for U nonimmigrant status might be beneficial, like the new Bona Fide Determination (BFD) process and the revived and expanded Central American Minors (CAM) program.

At the same time, the backlog and waitlist for U applications has grown exponentially. People who applied six years ago are just getting their approved U visas now, but for people who file today the wait could be several times that long. Additionally, this long wait means U petitions filed under one set of enforcement priorities and adjudication policies may be decided when other harsher policies are in place, thereby increasing the risk for denial and the negative consequences if denied. This advisory will lay out some of the main “pros” and “cons” to applying for U nonimmigrant status as they exist now, to help prospective applicants weigh the benefits and risks.

## I. Brief Background on the U Visa

U nonimmigrant status, commonly referred to as the U visa,<sup>1</sup> is an immigration remedy available to noncitizens who have been victims of certain serious crimes in the United States. It provides temporary lawful status for four years and allows those granted U nonimmigrant status to stay in the United States, obtain employment authorization, apply for lawful permanent resident status (a “green card”) after three years, and help certain qualifying family members obtain immigration status as well.

To apply for a U visa, an applicant must demonstrate:

- They were the victim of qualifying criminal activity (see below) that violated the laws of the United States or occurred in the United States;
- They suffered substantial physical or mental abuse as a result;
- They possess information concerning the criminal activity and have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal activity;
- They have certification from a federal, state, or local law enforcement authority certifying their helpfulness in the detection, investigation, or prosecution of the criminal activity; and
- They are admissible to the United States or demonstrate eligibility for a public interest waiver of any applicable inadmissibility factors.

In order to qualify for a U visa, the individual must have been a victim of “qualifying criminal activity,” listed in the regulations at 8 CFR § 214.14(a)(9) as abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraints, or attempt, conspiracy, or solicitation to commit any of the enumerated crimes, and other “similar”<sup>2</sup> related crimes.

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<sup>1</sup> Although the terms “U nonimmigrant status” and “U visa” are frequently used interchangeably, very technically these are two different things. Someone who is granted their U petition from inside the United States gets “U nonimmigrant status,” allowing them to remain legally in the United States, whereas someone outside the United States is issued a “U visa” to be admitted into the United States.

<sup>2</sup> “Similar” crimes are those where the elements of the crime are substantially similar. See 8 CFR § 214.14(a)(9) (definition of qualifying crime or qualifying criminal activity).

While a U petitioner must establish that they are admissible, they may seek a waiver for *any* applicable ground of inadmissibility except INA § 212(a)(3)(E), participation in Nazi persecution, genocide, torture, or extrajudicial killing. This means many grounds that have no waiver outside the U context potentially are waivable with the U visa, and also that waivers which in other contexts require a qualifying family member are available to a U petitioner as long as they can show that it is in the public interest to grant the waiver. See Part II, Section A.2. for more details.

There is a statutory cap of 10,000 U visas that may be issued per year.<sup>3</sup> The number of approved U applications far exceeds this amount. Under current backlogged case processing times, applicants face a multi-year wait for U visa adjudication, and then additional time before a U visa can be issued to them due to the cap. While waiting for a U visa to become available, individuals are generally placed on a lengthy waitlist (unless they get BFD, see below) after their petition has been preliminarily reviewed and found approvable. Once a person is added to the U visa waitlist, they receive deferred action (protection from removal) and are eligible to apply for work authorization, which can be renewed while they wait for final adjudication of their U application.

## II. “Pros” of Applying for a U Visa

With its generous waiver provisions, the U visa can be a rare chance to apply for immigration relief. Approval for U status provides temporary lawful status, work authorization, a pathway to permanent legal status that is not barred by almost all grounds of inadmissibility, and the ability to help family members obtain immigration status. See Section A, below.

Beyond those benefits directly associated with the U visa, other benefits of applying for U status include:

- Special confidentiality provisions;
- Eligibility for public benefits in many states;
- New Bona Fide Determination (BFD) process that enables certain “bona fide” applicants to get work permission and deferred action sooner than they would through the waitlist process, while their U petition is still pending;
- Revived and expanded Central America Minors (CAM) parole program, which includes U petitioners amongst those who can utilize the program to bring their children living abroad to the United States;

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<sup>3</sup> INA § 214(p)(2). The cap only applies to principal U applicants, not derivatives.

- Recent “victims-centered” ICE guidance that provides for special consideration of immigrant survivors, including U petitioners and U visa holders, in the enforcement context; and
- Change in policy that no longer prevents individuals with Deferred Action for Childhood Arrivals (DACA) from renewing their DACA once they are granted deferred action through the U process.

See Section B, below.

## A. General U Visa Benefits

### 1. Ability to Help Qualifying Family Members Apply for Immigration Status Too

U visa petitioners can help close family members obtain immigration status through the U visa process. As with principal petitioners, for many family members the U visa process may be one of the few ways they will be able to get legal status in the United States due to otherwise disqualifying criminal or immigration history.

U petitioners can include their spouses and children (unmarried and under age 21) as derivatives on their U visa petition using Form I-918A. If the principal petitioner is under 21 years old at the time they properly file their petition on Form I-918, in addition to their spouse and children they can include their parents and unmarried siblings under 18 years of age.<sup>4</sup> Family can also be included later; for family members who were not included as derivatives at the nonimmigrant application stage, there is a separate petitioning process for qualifying family members, using Form I-929, that can occur at the same time the principal adjusts status to lawful permanent resident or after they adjust (as long as the family relationship was in existence at the time the principal’s adjustment was granted).

U visa derivatives are not subject to the 10,000-visa limit set by the statute; their petitions are simply tied to the principal’s.

### 2. Waiver Available for Most Inadmissibility Grounds

Petitioners for U nonimmigrant status are subject to the grounds of inadmissibility at INA § 212(a), with the exception of the public charge ground.<sup>5</sup> As part of the U visa application process, a waiver is available for most grounds of inadmissibility that apply. Specifically, under INA § 212(d)(14) a petitioner for a U visa may apply for a waiver of any applicable inadmissibility

<sup>4</sup> Age is assessed at time of filing the principal’s petition. INA § 101(a)(15)(U)(ii)(I).

<sup>5</sup> U applicants are exempt from the public charge ground of inadmissibility. See INA § 212(a)(4)(E)(ii).

ground except for participation in Nazi persecution, genocide, torture, or extrajudicial killing (INA § 212(a)(3)(E)).

All other grounds are potentially waivable, although they will still factor into the discretionary decision to grant or deny, and in recent years USCIS has become less likely to grant waivers for U petitioners with criminal grounds of inadmissibility. Thus, it is important to consult with practitioners who are familiar with recent U visa adjudication trends and practice before submitting a U petition for someone who might have strong negative factors and criminal inadmissibility issues.<sup>6</sup> Nonetheless, this generous waiver provision means that individuals foreclosed from most other affirmative immigration relief options may be able to obtain lawful status through the U visa.

### **3. Work Authorization and Pathway to Lawful Permanent Resident Status**

U visa holders are given employment authorization which will allow them to work lawfully while they are in U nonimmigrant status. This work authorization is available to U petitioners once they either are issued Bona Fide Determination (BFD), discussed below, or are placed on the U waitlist. In addition, once the U petitioner is granted U status, they will also receive authorization to work lawfully while they remain in U status.

U visa holders may apply for adjustment of status to lawful permanent resident after being in U status for three years. Unlike the U visa, there is no numerical cap on the number of U-based adjustments that may be granted annually. U visa holders adjust under section 245(m) of the INA, a special section in the statute that applies only to those people who have received U status. Under this provision, the only ground of inadmissibility that applies to U nonimmigrants at time of adjustment is INA § 212(a)(3)(E) (participants in Nazi persecution, genocide, torture, or extrajudicial killings). Other than this, 245(m) U adjustment applicants are not required to establish that they are admissible. However, the adjustment grant is discretionary, and USCIS still may consider other inadmissibility grounds as part of the exercise of discretion.<sup>7</sup>

## **B. Other Benefits of Applying for U Visa**

### **1. Special Confidentiality Protections**

U nonimmigrant petitioners are covered under special confidentiality protections contained in 8 U.S.C. § 1367. This provision prohibits employees with the Department of Homeland Security,

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<sup>6</sup> However, as is discussed in Part III, the long wait for a final decision in a U visa case makes it nearly impossible to fully predict how borderline cases, with strong negative factors, might be handled.

<sup>7</sup> See 8 CFR § 245.24(d)(11) (“Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision...”).

including officials with USCIS and ICE, as well as Department of Justice and Department of State, from making adverse admissibility or deportability determinations based solely on information provided by the perpetrator of the criminal activity. It also prohibits officials from disclosing any information about a U application to anyone, especially a potential abuser or perpetrator in the case.

## 2. Eligibility for Public Benefits

In some states, like California, individuals are eligible for certain public benefits with a copy of the receipt notice proving that they have submitted a petition for U nonimmigrant status.<sup>8</sup> California allows applicants for U status to apply for state and local benefits and social service programs including Refugee Cash Assistance (RCA), California Food Assistance Program (CFAP), CalWorks, Cash Assistance Program for Immigrants (CAPI), In-Home Support Services (IHSS), Employment Social Services, Medi-Cal, General Assistance (GA), state food stamps, and Healthy Families, if they meet the eligibility requirements of the respective programs.

For information on public benefits eligibility for U applicants in other states, consult the National Immigration Law Center (NILC), <https://www.nilc.org/issues/economic-support/>.

## 3. Option to Get Work Authorization and Deferred Action Sooner Through New Bona Fide Determination (BFD) Process

On June 14, 2021, USCIS announced the U nonimmigrant “bona fide determination” process, an attempt to address the massive waitlist and backlog created by the U visa cap and long case processing times. This process gives certain U visa petitioners and their family members work authorization and deferred action while they wait for their U petition to be fully adjudicated.<sup>9</sup> Historically, U visa petitioners have had little to no protection while their petitions were pending, and the BFD is an attempt to give them protection (and work permission) sooner.

Petitioners who are issued BFD will get the benefit of deferred action and work authorization for four years while they continue to wait for their U visa adjudication; it can also be renewed. BFD issuance also satisfies the prima facie standard that ICE considers when granting a stay of removal for a pending U case.<sup>10</sup>

<sup>8</sup> Although individuals may be hesitant to access public benefits due to public charge, U nonimmigrants are exempt from the public charge ground of inadmissibility and thus should access all benefits for which they qualify, without fear of negative public charge consequences.

<sup>9</sup> U.S. Citizenship and Immigration Services Policy Manual (USCIS-PM), Vol. 3, Part C, Ch. 5.

<sup>10</sup> 3 USCIS-PM C.5(C)(4).



The BFD process is available to all pending U petitions and those that will be filed in the future. This process can benefit both the principal petitioner and qualifying family members<sup>11</sup> if they are living in the United States.<sup>12</sup> There is no separate application process to request BFD review; USCIS will initiate BFD review on all pending U petitions that have not yet undergone waitlist adjudication where the petitioner is residing in the United States.

USCIS will not favorably exercise its discretion to issue BFD for individuals deemed to be a threat to national security or public safety or who present other adverse factors, based on the results of the background check conducted as part of the overall U application process. Individuals whose background checks show convictions—or even just arrests—for offenses related to aggravated assault; sexual abuse; firearms; child pornography; or drug manufacturing, distributing, or sale, among other offenses, will likely be seen as raising “public safety” concerns and not issued BFD.

For more information on the U BFD process, see ILRC’s practice advisory, *Overview of the New U Nonimmigrant (“U Visa”) Bona Fide Determination* (Dec. 3, 2021)<sup>13</sup> and the USCIS Policy Manual on BFD at Volume 3, Part C, Chapter 5.

#### **4. Ability to Bring Children to the United States through Revived and Expanded Central American Minors (CAM) Parole Program**

In March 2021, the Biden administration launched a phased reopening and expansion of the Central American Minors (CAM) program, after the program had previously been terminated in 2018. CAM allows certain parents—and, with the expansion, legal guardians—who are lawfully present in the United States to bring their children living in El Salvador, Guatemala, or Honduras to the United States. The original CAM parole program allowed parents who were lawful permanent residents or who had been granted Temporary Protected Status, parole, deferred action, deferred enforced departure, or withholding of removal to petition to bring their children to the United States through this program. As part of the 2021 expansion, parents or legal guardians with pending U visa petitions (or pending asylum applications) filed before May 15, 2021 can now also apply to bring their children to the United States through the CAM program.

<sup>11</sup> Family members are eligible for BFD if the principal U petitioner is issued BFD and they have properly filed a complete I-918A with evidence of the qualifying family relationship to the principal U petitioner.

<sup>12</sup> Although a person can also apply for a U visa from outside the United States, USCIS says it does not have the authority to provide deferred action or work authorization for petitioners residing outside the United States thus these individuals are left out of the BFD process. If the principal U applicant is living outside the United States, unfortunately qualifying family members cannot get BFD even if they are living in the United States. See 3 USCIS-PM C.5(C)(7).

<sup>13</sup> See <https://www.ilrc.org/overview-new-u-nonimmigrant-%E2%80%9Cu-visa%E2%80%9D-bona-fide-determination>.

There is no fee to apply for the CAM program. For help applying, individuals should contact a designated resettlement agency in the United States.

For more information, see ILRC factsheet on the CAM program, available at <https://www.ilrc.org/central-american-minors-program>, and the USCIS webpage on CAM at <https://www.uscis.gov/CAM>.

## 5. Protections Under Current ICE “Victim-Centered” Approach to Immigration Enforcement

On August 10, 2021, U.S. Immigration and Customs Enforcement (ICE) issued a new directive entitled “Using a Victim-Centered Approach with Noncitizen Crime Victims,” meant to aid in minimizing the chilling effect that civil immigration enforcement actions may have on the willingness and ability of noncitizens survivors of crimes to contact and engage with law enforcement. Under this directive, ICE is instructed to refrain from enforcement action against noncitizens who are survivors of crimes or have witnessed a crime. This includes individuals who are recipients of survivors-based immigration benefits, like U visas, as well as those with pending applications for U status (or other victim-based relief, not discussed in this advisory).

The policy states that ICE will generally defer enforcement decisions for individuals covered by this directive until USCIS makes a final determination on the pending victim-based immigration benefit or, in the U context, decides not to issue bona fide determination.<sup>14</sup> For those with a pending victim-based application who have final removal orders, the policy states that, absent exceptional circumstances, ICE should generally issue a stay of removal.<sup>15</sup> If an individual has an immigration application approved or has been placed on the waitlist as a U petitioner, the policy directs ICE to review the case for the exercise of prosecutorial discretion, including considering the release of the individual if they are in ICE custody, so long as it is not prohibited by law and no exceptional circumstances apply.<sup>16</sup> In addition, the policy also directs ICE to coordinate with USCIS where the individual has a pending victim-based immigration petition.

For more information on this policy, see ASISTA’s *Q&A on ICE Directive: Using a Victim-Centered Approach with Noncitizen Crime Victims*, available at <https://asistahelp.org/wp-content/uploads/2021/08/ASISTA-Policy-Alert-New-ICE-Guidance-on-Victim-Centered-Approaches.pdf>. An ILRC practice advisory on this directive is also forthcoming.

<sup>14</sup> U.S. Immigration and Customs Enforcement, *Using a Victim-Centered Approach with Noncitizen Crime Victims*, 2 (Aug. 10, 2021), <https://www.ice.gov/doclib/news/releases/2021/11005.3.pdf>.

<sup>15</sup> *Id.* at 8.

<sup>16</sup> *Id.* at 9.



## 6. Ability to Maintain DACA While Also Being Granted Deferred Action through the U Process

Up until very recently, another consideration when deciding whether to apply for a U visa was USCIS's position that it could not grant two forms of deferred action. This affected individuals with Deferred Action for Childhood Arrivals (DACA) who were also eligible for a U visa. In general, an individual can apply for multiple forms of immigration relief if they qualify for them. However, because USCIS took the position that individuals could not hold two types of deferred action and DACA results in a two-year grant of deferred action (as well as employment authorization), meanwhile the U waitlist and U BFD result in a four-year grant of deferred action, someone who already had DACA might not want to apply for a U visa since once they got deferred action through the U visa, they would not be able to renew their DACA. This was especially problematic for those who wanted to travel abroad since only DACA, and not the U visa, allows for an application for advance parole travel permission.

Recently, USCIS seems to have changed its position. Beginning in April 2021 it appears that USCIS is no longer denying DACA renewals on the basis that the individual already has deferred action through the U waitlist or U BFD. This means individuals with DACA can now also apply for a U visa without worrying that they will be unable to renew their DACA later.

### **“Admission” for 245(a) Adjustment Purposes, Enabling Someone to Adjust Sooner with a Family Petition: No Longer a “Pro”?**

Based on an unpublished Board of Immigration Appeals decision,<sup>17</sup> for at least the last several years a grant of U nonimmigrant status has been treated as an “admission” for adjustment purposes under INA § 245(a), the general adjustment of status provision. This meant that individuals with another basis to adjust such as a family petition could apply for adjustment sooner than through the U-specific adjustment provision at INA § 245(m), which requires an applicant to have had U nonimmigrant status for a minimum of three years first, among other requirements.<sup>18</sup> Countless adjustments have been filed and approved using this reasoning. More recently, however, dicta in the U.S. Supreme Court decision *Sanchez v. Mayorkas* has called into question whether a grant of U status is an “admission” for adjustment purposes.<sup>19</sup> In light of the *Sanchez* case, USCIS has been holding these cases in abeyance while they await

<sup>17</sup> *Alejandro Garnica Silva*, A098 269 615 (BIA June 29, 2017).

<sup>18</sup> It is also important to note, however, that U applicants applying to adjust under § 245(a) rather than § 245(m) are subject to all the grounds of inadmissibility, rather than just § 212(a)(3)(E), and thus adjusting under the general adjustment of status provision may not be a great option for those with other inadmissibility issues, especially ones for which no waiver is available.

<sup>19</sup> See *Sanchez v. Mayorkas*, 141 S. Ct. 1809, 1814 (2021).

further guidance. However, there have been a few recent reports of approvals in these types of cases.

### III. “Cons” of Applying for a U Visa: Considerations When Submitting a U Visa Petition

As discussed above, the U visa gives some individuals the possibility to seek immigration relief despite complicated immigration histories and contact with the criminal legal system. Further, collateral benefits like work permission and deferred action through the BFD process, eligibility for state public benefits, and qualifying for CAM add to the advantages of submitting a U visa application, apart from what you directly get if your U visa application is ultimately granted.

On the other hand, it is nonetheless important to understand the potential pitfalls of applying for a U visa due to the very long adjudication time, which can span changes in presidential administrations with corresponding changes in enforcement priorities and other policies, especially since the U visa is so discretionary. All this can leave applicants vulnerable to more harsh consequences if their U visa petition is denied (and potentially a greater likelihood of denial, if adjudication trends also become less favorable).

#### A. Long Processing Times

Currently there are over 200,000 U visa petitions waiting to be adjudicated and every year many more applications are approved than the 10,000 cap. A U visa application submitted today will most likely not be granted full U status for many years. Further, time spent on the U waitlist or with U BFD does not count towards the three years required to then apply for a green card based on having a U visa.

In the 2021 fiscal year report, USCIS reported that from 2016 to 2020, petitioners saw an increase of wait time from 10 months to almost four years to be placed on the waitlist. In addition a wait of around 10 months in Fiscal Year 2016 from receipt of a U visa petition until placement on the waitlist, the time from waitlist placement until final adjudication at that time was 17.3 months. This drastically increased by the fourth quarter of Fiscal Year 2020, where average processing times for receipt notice of a U visa petition until placement on the waitlist grew to 50.9 months and the processing time from waitlist placement until final adjudication was 10 months.<sup>20</sup> In actuality, this wait is even longer, since USCIS began to review and issue BFD for those applications not yet placed on the waitlist, starting with petitions filed in late 2016.

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<sup>20</sup> Department of Homeland Security, *Humanitarian Petitions: U Visa Processing Times*, Aug. 12, 2021 Fiscal Year 2021 Report to Congress at 4, <https://www.uscis.gov/sites/default/files/document/reports/USCIS-Humanitarian-Petitions.pdf>.

Prior to the BFD process, individuals waiting to be placed on the waitlist did not have protection from deportation or access to work authorization. This often meant that individuals with pending U visa petitions had to wait on average four years—and often even longer—to receive a benefit under the U visa process. While the BFD process is supposed to address this issue by offering protection and benefits sooner to petitioners, it is unclear how rapidly this process will move. It was last reported that USCIS was issuing BFD grants for cases filed at the beginning of 2017. In addition, the BFD process will not cover all U petitioners and can leave out many petitioners who have a criminal record. For the individuals who are left out, they will need to wait for the regular U visa waitlist process to receive work authorization and protection from deportation.

## **B. Subject to Potentially Changing Enforcement Priorities and Other Policies**

The long wait for any kind of protection (and work authorization) through the U visa process means that applicants are also vulnerable to changing enforcement priorities and adjudication trends while they wait. For instance, individuals who submitted their U visa petitions during the Obama administration, which generally would not refer to removal proceedings those whose U petitions were denied, might have had their U application decided during the Trump administration, which applied its immigration court referral policy much more broadly. During the Trump administration, anyone whose application for immigration relief was denied and who lacked lawful status at time of denial could be referred to removal proceedings. Thus, an applicant might try to weigh the risk at the time they submit their application but have no way of knowing the risk when their application is adjudicated many years later.

Additionally, other policies might change during the long wait for a decision on a U visa application. During the Trump administration, for example, USCIS temporarily changed its Request for Evidence (RFE) and Notice of Intent to Deny (NOID) policy, so that applications lacking certain evidence might be denied without first giving the applicant an opportunity to fix the problem by submitting additional evidence. This policy (which applied to all applications decided by USCIS, not just U visa petitions) has since been rescinded by the Biden administration. Although the current administration has implemented more “friendly” immigration policies, such as the “victim-centered” ICE directive mentioned above, it is important to note that they can change again with a change in administration. Unfortunately, unless the U visa cap is increased and the backlog is significantly reduced, this indeterminate risk calculus will continue to be a factor when deciding whether to submit a U visa application.

## **IV. Conclusion**

A U visa provides many benefits, including a pathway to a green card, the ability to help family members, and the possibility to overcome inadmissibility issues that would disqualify a person

from most other immigration relief. There are also benefits to applying for a U visa, even before approval, including potential work permission and deferred action through the BFD process, potential eligibility for state public benefits, and eligibility for CAM, all benefits that apply to people with *pending* U applications. Nonetheless, it is important to thoroughly screen clients and assess the strength of the U case before submitting an application, given how long the process takes and inability to predict what policies will be in effect when the application is finally adjudicated.

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#### San Francisco

1458 Howard Street  
San Francisco, CA 94103  
t: 415.255.9499  
f: 415.255.9792

[ilrc@ilrc.org](mailto:ilrc@ilrc.org)  
[www.ilrc.org](http://www.ilrc.org)

#### Washington D.C.

600 14<sup>th</sup> Street NW  
Suite 502  
Washington, DC 20005  
t: 202.777.8999  
f: 202.293.2849

#### Austin

6633 East Hwy 290  
Suite 102  
Austin, TX 78723  
t: 512.879.1616

#### San Antonio

500 6<sup>th</sup> Street  
Suite 204  
San Antonio, TX 78215  
t: 210.760.7368

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