



U NONIMMIGRANT STATUS AS A DEFENSE FROM REMOVAL FOR LAWFUL PERMANENT RESIDENTS

By Rachel Prandini & Sally Kinoshita

In a time of increased immigration enforcement, advocates must consider all possible forms of relief for clients facing deportation. U nonimmigrant status (also frequently referred to as a “U visa”) is commonly pursued as an affirmative immigration benefit for undocumented individuals, but it may also be a particularly important form of removal defense for certain lawful permanent residents (LPRs) facing deportation, likely on the basis of criminal convictions. This Practice Advisory provides an introduction to U nonimmigrant status and details its benefits for LPRs facing deportation, as well as the particular issues LPRs may face in seeking this form of protection.

I. What is U nonimmigrant status?¹

U nonimmigrant status is a nonimmigrant (temporary) status that allows non-citizen victims of crime to stay in the United States, obtain employment authorization, apply for lawful permanent resident status, and help certain family members obtain immigration status as well. It was created by the Victims of Trafficking and Violence Prevention Act,² enacted in October 2000, and has since been amended through other laws several times. When Congress created U nonimmigrant status, their intention was to protect victims of certain crimes who have gathered the courage to come forward, report the crime, and assist in the criminal investigation and prosecution. The purpose of this is two-fold. First, it enhances law enforcement’s ability to investigate and prosecute crimes. Second, it furthers humanitarian interests by protecting victims of serious crimes.

A. What are the benefits of U nonimmigrant status?

The benefits of receiving U nonimmigrant status include:

- four years of nonimmigrant status;
- employment authorization;
- possibility of nonimmigrant status for derivative family members;
- possibility of lawful permanent residency after 3 years of U nonimmigrant status;
- additional inadmissibility waivers; and
- public benefits in some states.

B. Who is eligible for U nonimmigrant status?

To be eligible for U nonimmigrant status, the person must:

- have been the victim of a qualifying crime or similar activity in the United States (or of a qualifying crime or similar activity that violated U.S. laws);
- have suffered substantial physical or mental abuse as a result;
- have information about the crime and have been helpful, be helpful, or be likely to be helpful to law enforcement in the investigation or prosecution of the crime;
- have a certification from a federal, state, or local law enforcement authority certifying his or her helpfulness; and
- be admissible to the United States or be eligible for a waiver of inadmissibility.

Practice Pointer: Where to Find the Law, Regulations, and Policy on the U Visa. Most of the policy and procedure related to U nonimmigrant status are contained in one of three places: the statute, the regulations, or policy guidance issued by U.S. Citizenship & Immigration Services (USCIS).

The statute is the Immigration & Nationality Act (INA). The relevant sections are:

- INA § 101(a)(15)(U): U nonimmigrant status eligibility requirements
- INA § 214(p): Miscellaneous U nonimmigrant requirements
- INA § 212(d)(14): U nonimmigrant inadmissibility waivers
- INA § 245(m): U nonimmigrant adjustment of status provisions

Much of the policy and procedure are outlined in the regulations, the relevant sections of which are:

- 8 CFR §§ 212.17, 214.14: U nonimmigrant status
- 8 CFR § 245.24: U nonimmigrant adjustment of status

Finally, as is often the case with immigration policy and procedure, some important issues related to U nonimmigrant status are addressed in USCIS policy guidance memoranda. Some of these memoranda are available on the USCIS website at www.uscis.gov.

II. How can U nonimmigrant status help lawful permanent residents (LPRs)?

If an LPR is facing deportation, U nonimmigrant status may provide an important means of protection. The reason for this is that LPR clients who have no other avenue for relief from removal may still be eligible for U nonimmigrant status on account of the additional waiver provisions available to U nonimmigrant petitioners. The waiver for U petitioners that is specific to U nonimmigrant status grants the Secretary of Homeland Security the discretion to waive *any* ground of inadmissibility, except the grounds applicable to participants in Nazi persecutions, genocide, acts of torture, or extrajudicial killings.³ Thus, LPRs who may be ineligible for LPR cancellation of removal or a § 212(h) waiver because they have been convicted of aggravated felonies, or who are removable and barred because they do not meet the residence requirements for those remedies, could still be eligible for U nonimmigrant status and waivers of inadmissibility. In addition, the more general nonimmigrant waiver is also available to U nonimmigrant petitioners, and it can be used to waive most inadmissibility grounds.⁴ LPRs in removal proceedings—like any petitioner for U nonimmigrant status—will need to show that they merit a favorable exercise of discretion to waive all relevant inadmissibility grounds. This may be challenging for clients who are in removal proceedings or currently detained, but it is not impossible.

Practice Note: Prevailing in U nonimmigrant cases for LPR clients in proceedings is difficult. LPRs facing the loss of their status who wish to seek U nonimmigrant status should understand that they face significant hurdles to overcoming a discretionary denial or being granted an inadmissibility waiver based on public interest.

As discussed below, they may also face barriers related to the need for a final order of removal. Therefore, clients should be realistically apprised of the potentially low likelihood of success in their case and reminded of the importance of their active participation to ensure you can make the best case that they merit discretionary approval and that a waiver of any inadmissibility issues would be in the public interest.

III. What special considerations exist for LPRs seeking U nonimmigrant status?

A. A final order of removal must be entered before USCIS will adjudicate a petition for U nonimmigrant status.

The Vermont Service Center (VSC)—the division of USCIS that adjudicates petitions for U nonimmigrant status—currently takes the position that it cannot approve U nonimmigrant status for a lawful permanent resident.⁵ In other words, a U nonimmigrant petition will not be adjudicated and cannot be approved unless the petitioner is not a lawful permanent resident. This means that an LPR who is in removal proceedings but wishes to apply for a U visa must first receive a final order of removal. A final order of removal means one issued by an immigration judge (IJ) or the Board of Immigration Appeals (BIA), if the immigration judge’s decision is appealed to the BIA.⁶

Given the need for a final order of removal before an LPR can seek U nonimmigrant status, advocates are encouraged to take the following approach:

- file a petition for U nonimmigrant status (the Form I-918) with the VSC, alerting the VSC to the fact that the petitioner is in removal proceedings and asking the VSC to hold petitioner’s Form I-918 in abeyance;
- once the final removal order has been issued, file a Form I-246⁷ stay application with ICE Enforcement and Removal Operations (ERO) and alert VSC with a copy of the final order of removal;
- wait for VSC to issue a prima facie notice⁸ to the local ICE ERO;
- follow up with the local ICE ERO, which should then grant a stay of removal pending adjudication of the U nonimmigrant petition.

The individual—if detained—will remain subject to ICE custody even if the stay is granted.⁹

Keep in mind that there is an annual limit of 10,000 U visas per fiscal year.¹⁰ The annual cap has been reached for several years, which has created a backlog. As a result, U visa petitioners should expect to wait several years before receiving a final decision on their case. However, USCIS will issue preliminary determinations on cases in the queue, which can allow petitioners to be granted deferred action and be eligible for work authorization.¹¹ Given the volume of cases, however, it will take time for such a preliminary determination to be issued, at the time of writing this advisory, approximately two years or more. Clients who are detained must understand this reality.

If a potential U nonimmigrant is ordered removed and is actually physically removed from the United States before she has the opportunity to petition for U nonimmigrant status, she may still file her Form I-918 and Form I-192 from outside the United States. She will need to have all relevant inadmissibility grounds waived—including those related to her removal—and be prepared to consular process if her Form I-918 is approved.

Practice Note: Practitioners pursuing U nonimmigrant relief for LPR clients in removal proceedings and who plan to file an appeal with the Administrative Appeals Office or BIA are encouraged to contact Asista at <http://www.asistahelp.org> for technical assistance and to ensure that litigation efforts are coordinated.

B. The Seventh Circuit has held that immigration judges have concurrent jurisdiction over inadmissibility waivers sought by U petitioners under INA § 212(d)(3)(A).

LPRs who wish to petition for U nonimmigrant status as a defense from removal often have criminal convictions that make them inadmissible. Typically, inadmissible U petitioners must seek a waiver from USCIS, but they have little recourse if the waiver is denied, as there is no appeal within USCIS of a decision to deny an inadmissibility waiver for a U petitioner.¹² However, a March 2014 case in the Seventh Circuit Court of Appeals called *L.D.G. v. Holder* gave concurrent jurisdiction to the immigration judge and USCIS over the Form I-192 waiver for a U nonimmigrant petitioner. In *L.D.G.*, the Seventh Circuit examined the two waiver provisions available to U nonimmigrant petitioners.¹³ The Court reasoned that the statute states that waiver authority in U nonimmigrant cases under INA § 212(d)(14) rests with DHS. However, the Seventh Circuit noted that since waiver authority under INA § 212(d)(3)—a general nonimmigrant waiver—is committed to the discretion of the Attorney General, it can also be exercised through delegation of authority by an immigration judge or the BIA. A more recent Seventh Circuit decision *Baez-Sanchez v. Sessions*¹⁴ reaffirmed *L.D.G.*, as discussed below.

Following the *L.D.G.* decision, the Third Circuit reached a contrary conclusion in *Sunday v. AG United States*, 832 F.3d 211 (3d Cir. 2016). The Third Circuit distinguished its decision from the Seventh Circuit's decision in *L.D.G.* and found that under the regulations, the only time an IJ has jurisdiction to adjudicate an INA § 212(d)(3) waiver is when the waiver request was first made to a USCIS district director before the individual actually arrived in the United States.

On the heels of the *Sunday* decision, the BIA also held in *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016) that immigration judges do not have authority to adjudicate a request for a waiver of inadmissibility under INA § 212(d)(3) by a petitioner for U nonimmigrant status. The BIA reasoned that even if the Attorney General has jurisdiction over these waivers, immigration judges do not, due to the governing regulations and the limited circumstances in which they give immigration judges jurisdiction over nonimmigrant waiver requests. It also held that since *L.D.G.* did not determine the language of section 212(d)(3)(A)(ii) to be unambiguous, the BIA's own interpretation of the statute should be followed in accordance with the *Chevron* doctrine (see *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). As a result, following the decision, *Matter of Khan* was followed by immigration judges nationwide, including those sitting in the Seventh Circuit. However, on October 6, 2017, the Seventh Circuit reaffirmed *L.D.G.* and rejected the reasoning of *Sunday* and *Khan*. **Following the Baez-Sanchez decision, immigration judges will take jurisdiction over U waiver applications, but only in the Seventh Circuit.** Nonetheless, in cases where a U petitioner has been or is likely to be unsuccessful in seeking a waiver from USCIS, advocates in other circuits may wish to continue to raise these arguments before the IJ in order to preserve the record for appeal to the circuit court.¹⁵

For an in-depth discussion of the legal and practical aspects of seeking U nonimmigrant inadmissibility waivers in removal proceedings, including for LPRs, see National Immigrant Justice Center, *Practice Advisory: U Visa Inadmissibility Waivers in Removal Proceedings* (Dec. 2017), available at https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-12/NIJC_UvisaPracticeAdvisory_2017-12-14.pdf.

End Notes

¹ The terms “U visa” and “U nonimmigrant status” are often used interchangeably by attorneys and advocates. However, there is an important distinction between the two. Nonimmigrant status is a form of immigration status granted to an individual when she is already in the United States or she arrives in the United States; it allows an individual temporarily to remain legally in the United States as a U nonimmigrant. A visa is a document placed in an individual’s passport by a U.S. consular official; it permits the noncitizen to enter the United States and travel into and out of the United States. Therefore, the U visa allows a noncitizen to enter the United States; U nonimmigrant status allows her to remain in the United States.

² Pub. L. 106-386, 114 Stat. 1464 (Oct. 28, 2000).

³ INA § 212(d)(14).

⁴ INA § 212(d)(3)(A).

⁵ Note that many advocates disagree with this interpretation. For a more in-depth discussion of this issue, see NIJC, *Practice Advisory: U Visa Inadmissibility Waivers in Removal Proceedings* (Dec. 2017), p. 7-10, available at https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-12/NIJC_UvisaPracticeAdvisory_2017-12-14.pdf.

⁶ As of the writing of this Practice Advisory, relinquishing LPR status through the filing of Form I-407 does not appear to work for LPRs in removal proceedings who seek U nonimmigrant status as relief from removal. This is because VSC interprets the I-407 process as one that must be sought from outside the United States or from Customs & Border Protection at the port of entry.

⁷ The filing fee for Form I-246 is currently \$155, or a fee waiver may be requested.

⁸ This is a process where VSC does a cursory review of the petition and confirms that it looks complete and potentially approvable. It does not mean that it will eventually be approved, nor is it the same thing as a conditional approval. While technically this request should come from ICE, you can email the VAWA unit hotline) to follow up on the request and remind them of the urgency of the situation. The email address is hotlinefollowup19181914.vsc@uscis.dhs.gov.

⁹ Advocates can always request that ICE exercise prosecutorial discretion and release their clients. Further, depending on the factual circumstance and the federal circuit in which the individual is detained, it may also be possible to seek release for your client on bond. For further information on prolonged detention and bond, see American Civil Liberties Union, *Immigration Detention Resources*, available at <https://www.aclu.org/issues/immigrants-rights/immigrants-rights-and-detention/immigration-detention-resources>.

¹⁰ INA § 214(p)(2)(A).

¹¹ 8 CFR § 214.14(d)(3).

¹² It is, however, possible to file a motion to reopen or reconsider the denial, or to refile the waiver. 8 CFR § 212.17(b)(3). For an argument that the BIA should have jurisdiction over an appeal of the denial of a waiver under INA § 212(d)(3)(A), see NIJC, *Practice Advisory: U Visa Inadmissibility Waivers in Removal Proceedings* (Dec. 2017), p. 12-15, available at https://www.immigrantjustice.org/sites/default/files/uploaded-files/no-content-type/2017-12/NIJC_UvisaPracticeAdvisory_2017-12-14.pdf.

¹³ 8 CFR § 212.17(a), (b).

¹⁴ *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017).

¹⁵ If you intend to litigate this issue, it is important to create a strong record before the immigration judge regarding both why the client merits the exercise of discretion and the legal arguments for why the immigration judge has jurisdiction to adjudicate the waiver. Practitioners pursuing these cases who plan to file an appeal with the Administrative Appeals Office or BIA are encouraged to contact Asista at <http://www.asistahelp.org> for technical assistance and to ensure that litigation efforts are coordinated.



San Francisco

1663 Mission Street, Suite 602
San Francisco, CA 94103
t: 415.255.9499 f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1016 16th Street, NW, Suite 100
Washington, DC 20036
t: 202.777.8999 f: 202.293.2849

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