



**Identifying Immigrants Eligible to  
Legalize their Status: A Guide for  
Non-Attorney Advocates  
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**Center for Human Rights and Constitutional Law  
256 S. Occidental Blvd.  
Los Angeles, CA 90057  
Telephone: (213) 388-8693**

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## **Population of Undocumented Immigrants Eligible for Immigration Relief**

A study published by the Center for Migration Studies of New York (CMS) found that 14.3 percent of immigrants screened for DACA eligibility were potentially eligible for some other immigration benefit or relief. The results were based on a survey on unauthorized immigrants who were found to be potentially eligible for permanent immigration status during screening for the Deferred Action for Childhood Arrivals (DACA) program. A table of the most commonly identified forms of relief is below.

<b>Most Common Remedies Available for Individuals Eligible For Legal Status</b>	
Legal Permanent Residency (LPR)	25%
U Visa for victims of crime	23.9%
Special Immigrant Juvenile Status (SIJS)	12.6%

Unlike DACA, these legal remedies could place individuals on a path to lawful permanent residence and citizenship. According to the survey, people without status who sought legal assistance for reasons other than DACA applications were also potentially eligible for other forms of relief.

### **Areas Influenced by Immigration Status**

- Access to work authorization
- Protection from deportation and removal
- Eligibility to obtain a driver’s license and social security number
- Better access to housing and public services
- No longer have to reside “off the grid”
- May travel to and from the U.S. (with some exceptions)
- Path to lawful permanent residency and ultimately citizenship

### **Grounds of Inadmissibility**

The inadmissibility grounds are provisions found in the Immigration and Nationality Act (INA) that identify a **wide range of classes** of noncitizens **ineligible to receive visas** and **ineligible to be admitted to the United States**. Given the substantial implications that falling into one of the classes identified in the inadmissibility grounds may have on an individual hoping to apply for immigration benefits, practitioners should screen their clients for potential inadmissibility before filing any applications or petitions with USCIS.

Notable sections of the INA regarding grounds of inadmissibility include:

- **INA Section 212(a)** – lists all the grounds of potential inadmissibility
- **INA Section 212(d)(14)** – All grounds of inadmissibility (except national security grounds) can be waived for U visa applicants

Common Inadmissibility Issues Include:

- Crimes/criminal activity of the applicant, INA 212(a)(2)
  - Crimes involving moral turpitude (CIMT's), drug offenses, multiple criminal convictions, etc.
- Immigration violations –
  - Entry without inspection (EWI) entry, INA 212(a)(6)
  - Unlawful presence (ULP), INA 212(a)(9)(B)
  - Permanent bar, INA 212(a)(9)(C)
- No passport, INA 212(a)(7)

**General Categories of Immigration Status**

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**U.S. Citizen** – U.S. citizenship is usually gained by persons at birth in the United States. It also may be gained by birth to U.S. citizen parents or through naturalization.

**Lawful Permanent Resident (LPR)** – A grant of lawful permanent resident (LPR) status allows an individual to reside and work permanently in the United States. To be eligible for LPR status, the applicant must indicate an intention to reside permanently in the U.S.

**Non-immigrant Visa Holder** – The law provides for a variety of categories of individuals that are eligible for visas to legally enter the United States on a temporary basis for a limited period of time. These visa holders are classified as non-immigrants under Federal immigration law. Eligible aliens include vacationers, students, certain classes of temporary workers, and a variety of specialized categories. The authorized length of stay is specified in the visa. The individual may have to take certain actions to maintain the status.

**Asylees and Refugees** – Once admitted the alien will be allowed to stay in the U.S. as long as expulsion from the U.S. would put them at a safety risk, unless he or she meets one of the grounds for loss of status. An alien granted refugee/asylee status may apply for LPR status after one year.

**Immigrants with Temporary Status** – The law provides for individuals who have been subject to certain events, such as human trafficking, crime, and abuse, abandonment, and neglect by a parent, to apply for a legalized status allowing them to temporarily reside in the United States legally. Like non-immigrant visa holders, these individuals are classified as non-immigrants under Federal immigration law. However, unlike other non-immigrant visas, individuals with these status’ may transition to LPRs if they meet certain criteria.

**Temporary Protected Status** – Persons from designated countries who have been granted the right to remain and work in the U.S for a specified time. This is generally due to adverse and extraordinary circumstances in their home country.

**Undocumented** – A person who enters or resides the U.S. without legal permission or fails to leave the U.S. when their permissible time ends.

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### **Potential Legal Remedies for Immigrants without Legal Status**

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- Citizenship/ Derivative Citizenship
- Applications filed with USCIS
  - VAWA self-petition
  - Battered spouse waivers
  - U visa
  - T visa
  - SIJS
  - DACA
  - Asylum
  - Withholding of removal
- Forms of relief from removal-granted by an Immigration Judge
  - VAWA cancellation of removal
  - VAWA suspension of deportation

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### **Common Forms of Relief**

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#### **I. U.S. Citizenship**

A LPR can apply for U.S. citizenship after five years of having LPR status, or three years of marriage to a USC while an LPR. They must also establish good moral character and should not be deportable. Some current and former military personnel can naturalize without being LPRs and while in removal proceedings.

Many individuals after being screened come to find out that they have been U.S. Citizens all along. People falling into this category are said to have derivative citizenship.

### **a. Acquisition or Derivation of U.S. Citizenship**

When screening your client, the questions below may be used to see if they are United States Citizen. If the answer to any question is yes, your client could already be a U.S. Citizen:

- Was the client born in the United States or its territories? Or,
- At time of his or her birth abroad, did client have a USC parent or grandparent? Or,
- Before age of 18, in either order: did client become an LPR, and did one of client's parents naturalize to U.S. citizenship? Or, was the client adopted by a USC before the age of 16 and became an LPR before age 18?

The requirements for obtaining derivative citizenship are outline in 8 U.S.C. § 1431(a):

In general. A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

- (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.
- (2) The child is under the age of eighteen years.
- (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

## **II. Lawful Permanent Residence**

**Obtaining LPR Status:** Five categories of non-citizens who can acquire lawful permanent resident (LPR) status in the United States.

1. family-sponsored immigrants;
2. employment-based immigrants;
3. diversity immigrants;
4. refugees; and

5. a select group of vulnerable immigrants including certain juveniles and crime victims that cooperate with law enforcement.

**The general requirements for obtaining LPR Status are laid out in 8 U.S.C. § 1255(a):**

**The status of an immigrant who has been inspected and admitted, or paroled** into the United States **or** the status of any other alien having an **approved petition** for classification as a **VAWA self-petitioner** may be adjusted ... to that of an alien lawfully admitted for permanent residence if:

1. the alien makes an application for such adjustment,
2. the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and
3. an immigrant visa is immediately available to him at the time his application is filed.

**8 U.S.C. §1255(a); INA § 245(a).**

To apply for LPR status an individual must be admissible to the United States under **section 212(a) of the Immigration and Nationality Act (INA)**. Some individuals are rendered inadmissible **based on** their own **prior conduct** (*See e.g.*, INA §§212(a)(2) (criminal admissibility grounds); (a)(9) (previous removals)) while others may be inadmissible based on their **status** (*See e.g.*, INA § 212(a)(1)(A)(i) (individuals afflicted with certain communicable diseases)).

**Benefits of LPR Status:**

- Permission to indefinitely reside and work in the United States (INA § 101(a)(20); 8 C.F.R. § 274a.12(a)(1)),
- Are on a path to citizenship (INA § 316), and
- May have the opportunity to apply for various government benefits and sponsor certain relatives for immigration benefits (INA § 204(a)(1)(B)(i)(I)).

**a. Adjustment of Status**

Adjustment of status is the process by which an individual may acquire LPR status while in the United States. The general rule is that only individuals who were “inspected and admitted or paroled” into the United States by an immigration officer may apply for LPR status from inside the United States. INA § 245(a).

Many of those who were not “inspected and admitted or paroled” into the United States (i.e. those that crossed the border without passing through an official checkpoint) have to leave the country to have their paperwork processed by the U.S. consulate in the immigrant’s place of last residence abroad to obtain LPR status. 22 C.F.R. § 42.61(a). This departure can trigger harsh penalties that can strand immigrants abroad for months, years, decades, and sometimes forever. **INA § 212(a)(9) (establishing 3, 5, and 10 year bars).**

However, case law has recognized two other entry narratives, which also meet the “inspected and admitted” requirement:

- “Wave through” entries even where the noncitizen lacks proper entry documents. A noncitizen who physically presents himself or herself for inspection, makes no false claim to U.S. citizenship, and is permitted to enter the United States (i.e., waved through), is deemed to have been “inspected and admitted,” even if the inspecting officer asks no questions and even if the noncitizen lacks proper entry documents. See *Matter of Areguillin*, 17 I&N Dec. 308 (BIA 1980); *Matter of Quilantan*, 25 I&N Dec. 285 (BIA 2010).
- Entry gained upon fraud or misrepresentation (other than false claim to U.S. citizenship). The majority of circuit courts and the Board of Immigration Appeals treat a noncitizen who has been inspected and allowed to enter as someone who has been “inspected and admitted” even if the admission was gained through fraud, misrepresentation or the use of false documents, provided the noncitizen did not falsely claim U.S. citizenship. See, e.g., *Emokah v. Mukasey*, 523 F.3d 110, 118 (2d Cir. 2008); *Martinez v. Attorney General*, 693 F.3d 408, 414 (3d Cir. 2012); *Borrego v. Mukasey*, 539 F.3d 689, 693 (7th Cir. 2008); *Yin Hing Sum v. Holder*, 602 F.3d 1092, 1097-99 (9th Cir. 2010); but see *Ramsey v. INS*, 14 F.3d 206, 211 n.6 (4th Cir. 1994).

There are some exceptions to the general rule that only those “inspected and admitted or paroled” are able to adjust their status to acquire LPR status without departing the United States. These include:

- VAWA
- U Visa
- SIJS



- If a family member or an employer filed certain petitions<sup>1</sup> on behalf of your client or your client's spouse or parent on or before April 30, 2001, and a visa is immediately available for your client. See INA § 245(i); 8 C.F.R. § 245.10.

#### **b. LPR Cancellation of Removal**

In some cases, legal permanent residents (LPR) of the United States are placed into deportation proceedings by ICE after being convicted of certain crimes or broking other immigration laws. If this occurs, your client may be able to apply for a one-time-only pardon that allows them to cancel their deportation, known as cancelation of removal.

To be eligible for Cancellation of Removal, your client must be a LPR who (a) is not convicted of an aggravated felony; (b) has been a LPR for at least five years; and (c) has lived in the U.S. for at least seven years since being admitted in any status (e.g. as a tourist, LPR, border crossing card).

In addition to satisfying the three statutory eligibility requirements under INA § 240A(a) which are that the applicant (1) has been an alien admitted for permanent residence for not less than 5 years, (2) has resided in the U.S. continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony), an applicant for LPR Cancellation of Removal must establish that s/he warrants relief as a matter of discretion. An Immigration Judge (IJ) has discretion to determine whether a particular applicant should be granted Cancellation of Removal relief. An IJ must balance the adverse factors evidencing the individual's undesirability as a lawful permanent resident with the social and humane considerations presented on his or her behalf to determine whether the granting of relief appears to be in the best in interest of the United States.

#### **c. Former 212(c)**

The 1996 enactment of the Illegal Immigration Reform and Immigrant

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<sup>1</sup> I-130 (Petition for Alien Relative); I-140 (Immigrant Petition for Alien Worker); I-360 (Petition for Amerasian, Widow(er), or Special Immigrant); I-526 (Immigrant Petition by Alien Entrepreneur); or labor certification. Labor certification is the process by which a noncitizen's potential employer establishes that there are no domestic workers available to perform such work and that the entry of the noncitizen will not adversely affect the wages and working conditions of similarly employed U.S. workers. INA § 212(a)(5).

Responsibility Act (IIRIRA) merged the former § 212(c) waiver-of-deportation and suspension-of-deportation methods of relief, and consolidated them into a statutory scheme of “Cancellation of Removal.”

Though Congress repealed § 212(c) relief, § 212(c) relief still can be invoked in some instances by noncitizens whose convictions were obtained through plea agreements and who, notwithstanding those convictions, would have been eligible for § 212(c) relief at the time of their plea.

A LPR whose convictions pre-date April 24, 1996 might be eligible for the former 8 USC § 1182(c), INA § 212(c), even if the conviction(s) are aggravated felonies. Screen for this relief if client is an LPR who is deportable based on one or more convictions for an aggravated felony, or other deportable offense, that occurred before April 24, 1996. Section 212(c) might be available for a conviction occurring between April 24, 1996 and April 1, 1997.

#### **d. Immigrating Through Family**

A client might apply for a green card if they have : (a) USC spouse; USC child at least age 21; or USC parent if client is unmarried & under age 21 (“immediate relative”); or (b) LPR spouse; LPR parent if client is unmarried; USC parent if client is at least age 21 and/or married; or USC sibling (“preference”).

To immigrate through family the person must be “admissible.” That means either she must not come within any of the grounds of inadmissibility at INA § 212(a), or if she comes within one or more inadmissibility grounds, she must qualify for and be granted a waiver of the ground(s). One can consular process outside the U.S. or “adjust status” if within the U.S. and meets the requirements at INA §245.

Adjustment can be a defense for LPRs facing deportation, as well as for those that are undocumented and are seeking LPR status.

### **III. DACA-Deferred Action for Childhood Arrivals**

If your client entered U.S. before turning 16 and before 6/15/2007 (depending on a pending lawsuit, this date may become 1/1/2010), and is in or could enroll in certain educational programs or military they may be eligible for the DACA program.

DACA affords recipients a temporary reprieve from deportation, it is not a

panacea. What DACA recipients receive, in essence, is a decision by immigration officials that no enforcement action will be taken against them for the two-year duration of the DACA grant, which is subject to renewal. In other words, DACA recipients are not to be deported as long as they have DACA. A DACA grant, however, does not lead to lawful permanent resident status (also known as a “green card”) or a path to citizenship, and may be rescinded, modified or withdrawn in the future.

#### **IV. Cancellation of Removal for Nonpermanent Residents**

Under the 1996 IIRIRA, two forms of Cancellation of Removal were devised, INA §§ 240A(a) and 240A(b). Cancellation of Removal for non-LPRs is available to “an alien who is inadmissible or deportable.” Unlike § 240A(a), which applies only to LPRs, § 240A(b) applies to all noncitizens who may qualify.

To be eligible for this defense in removal proceedings, client must have lived in U.S. at least ten years and have a USC or LPR parent, spouse or child, and not have a conviction for a deportable or inadmissible crime. The client must show that the family member(s) will suffer exceptional and unusual hardship. The client must also be able to show good moral character for the ten years prior to decision and warrant cancellation in discretion

#### **V. Suspension of Deportation**

This relief might permit an undocumented person with old convictions— even old drug convictions—to become a lawful permanent resident. This is a defense under pre-1997 deportation proceedings that can be applied for in removal proceedings arising in the Ninth Circuit Court of Appeals; other circuit courts of appeals may not have considered the issue. The Ninth Circuit indicated that a noncitizen still may apply for suspension of deportation today in removal proceedings, if he was convicted of a deportable offense before April 1, 1997. The court used the same reliance analysis on eligibility for suspension that the U.S. Supreme Court used in considering the former §212(c) relief, in *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). See *Lopez-Castellanos v. Gonzales*, 437 F.3d 848, 853 (9th Cir. 2006), *Hernandez De Anderson v. Gonzales*, 497 F.3d 927, 935 (9th Cir. 2007).

#### **VI. VAWA Relief**

Your client, or certain family member/s, are eligible for VAWA Relief if they have

been abused (including emotional abuse) by a USC or LPR spouse, parent, or adult child. (If abuser is not a USC/LPR, consider U Visa, below.)

**8 U.S.C. §1101(a)(51)** The term “VAWA self-petitioner” means an alien, or a child of the alien, who qualifies for relief under—

- (A) clause (iii), (iv), or (vii) of section 1154(a)(1)(A) of this title;
- (B) clause (ii) or (iii) of section 1154(a)(1)(B) of this title;
- (C) section 1186a(c)(4)(C) of this title;
- (D) the first section of Public Law 89–732 (8 U.S.C. 1255 note) (commonly known as the Cuban Adjustment Act) as a child or spouse who has been battered or subjected to extreme cruelty;
- (E) section 902(d)(1)(B) of the Haitian Refugee Immigration Fairness Act of 1998 (8 U.S.C. 1255 note);
- (F) section 202(d)(1) of the Nicaraguan Adjustment and Central American Relief Act; or
- (G) section 309 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (division C of Public Law 104–208).

**8 U.S.C. § 1154(a)(1)(A)(iii)(I)** An alien who is described in subclause (II) may file a petition with the Attorney General under this clause for classification of the alien (and any child of the alien) if the alien demonstrates to the Attorney General that—

- (aa) **the marriage or the intent to marry the United States citizen** was entered into in **good faith** by the alien; and
- (bb) during the marriage or relationship intended by the alien to be legally a marriage, **the alien or a child of the alien has been battered or has been the subject of extreme cruelty** perpetrated by the **alien’s spouse or intended spouse**.

(II) For purposes of subclause (I), an alien described in this subclause is an alien—

- (aa)
  - (AA) who is the spouse of a citizen of the United States;
  - (BB) who believed that he or she had married a citizen of the United States and with whom a marriage ceremony was actually performed and who otherwise meets any applicable requirements under this chapter to establish the existence of and bona fides of a marriage, but whose marriage is not legitimate solely because of the bigamy of such citizen of the United States; or
  - (CC) who was a bona fide spouse of a United States citizen within the past 2 years and—

- (aaa) whose spouse died within the past 2 years;
- (bbb) whose spouse lost or renounced citizenship status within the past 2 years related to an incident of domestic violence; or
- (ccc) who demonstrates a connection between the legal termination of the marriage within the past 2 years and battering or extreme cruelty by the United States citizen spouse;

**8 U.S.C. § 1154(a)(1)(A)(iv)** An alien who is **the child of a citizen of the United States, or who was a child of a United States citizen parent who within the past 2 years lost or renounced citizenship status related to an incident of domestic violence**, and who is a **person of good moral character**, who is **eligible to be classified as an immediate relative** under section 1151(b)(2)(A)(i) of this title, and who **resides, or has resided in the past, with the citizen parent** may file a petition with the Attorney General under this subparagraph for classification of the alien (and any child of the alien) under such section if the alien demonstrates to the Attorney General that the alien has been **battered by or has been the subject of extreme cruelty perpetrated by the alien’s citizen parent**. For purposes of this clause, residence includes any period of visitation.

**8 U.S.C. § 1154(a)(1)(A)(vii)** An alien may file a petition with the Secretary of Homeland Security under this subparagraph for classification of the alien under section 1151(b)(2)(A)(i) of this title (**Immediate Relatives**) if the alien—

- (I) is the **parent of a citizen** of the United States or **was a parent of a citizen** of the United States who, **within the past 2 years, lost or renounced citizenship status related to an incident of domestic violence or died**;
- (II) is a person of **good moral character**;
- (III) is eligible to be classified as an **immediate relative** under section 1151(b)(2)(A)(i) of this title (**Immediate Relatives**);
- (IV) **resides, or has resided, with the citizen daughter or son**; and
- (V) demonstrates that the alien has been battered or subject to extreme cruelty by the citizen daughter or son.

Those eligible to self-petition under VAWA are:

- Spouse. The current and, in some cases, former abused spouses of U.S. citizens or LPRs. See 8 U.S.C. § 1154(a)(1)(A)(iii); INA § 245(i); 8 C.F.R. § 245.10.
- Parent.
  - The **parent of a child** who has been **abused by the parent’s U.S.**

**citizen or LPR spouse.**

- The **parent of a U.S. citizen** where the **U.S. citizen child has abused the parent**. See INA § 245(i); 8 C.F.R. § 245.10.
- Child. **Unmarried children under 21** who have been **abused by a U.S. citizen or LPR parent** (including certain adoptive parents). See **8 U.S.C. § 1154(a)(1)(A)(iv)**; INA § 245(i); 8 C.F.R. § 245.10.
- Certain sons and daughters under 25. Individuals between the ages of 21 and 24 **who qualified as abused children on the day before they turned 21**. INA § 204(a)(1)(D)(v).

Benefits of VAWA Protections

- Deportation: Protection from deportation shortly after filing.
- Immigration Benefits for Children:
  - VAWA self-petitioners’ children receive immigration benefits – no separate petition needed
- Public Benefits: As qualified immigrants (≈ 3 months)
- Employment Authorization:
  - Citizen abuser (≈ 6 months);
  - Lawful permanent resident abuser (currently ≈ 6 months, past ≈ 15 months)
- VAWA Confidentiality: protections against the release of information and reliance on abuser provided information
- Lawful Permanent Residency:
  - Citizen perpetrator apply upon approval (1 year)
  - Lawful permanent resident perpetrator (≈ 5+ years-depends on when a visa is available)

**VII. Special Immigrant Juvenile Status (SIJS)**

For juveniles, and must be able to file immigration process by age 21. Client must be in delinquency, dependency, probate, family court, etc. proceedings and can’t be returned to at least one parent due to abuse, neglect or abandonment.

An individual is eligible for SIJS if he or she:

- Is under 21 years of age;
- Is unmarried;
- Is the subject of an order issued by a juvenile court (i.e., juvenile court, probate court, family court) that finds:
  - The child is dependent on the court or legally committed to or under

the custody of an agency or department of a State, or an individual or entity appointed by a State or juvenile court;

- The child's reunification with his or her parent(s) is not viable due to abuse, neglect, abandonment or a similar basis under State law; and
- It is not in the child's best interest to be returned to his or her country of nationality or last habitual residence or that of his or her parent(s).

See INA § 101(a)(27)(J)

INA § 101(a)(27)(J) An immigrant who is present in the United States--

(i) **who has been declared dependent on a juvenile court** located in the United States or whom such a **court has legally committed to, or placed under the custody of, an agency or department of a State, or an individual or entity appointed by a State or juvenile court located in the United States**, and whose **reunification with 1 or both of the immigrant's parents is not viable due to abuse, neglect, abandonment, or a similar basis found under State law**;

(ii) for whom it has been determined in administrative or judicial proceedings that **it would not be in the alien's best interest to be returned to the alien's or parent's previous country of nationality or country of last habitual residence**; and

(iii) in whose case the Secretary of Homeland Security consents to the grant of special immigrant juvenile status, except that--

(I) **no juvenile court has jurisdiction to determine the custody status or placement of an alien in the custody of the Secretary of Health and Human Services** unless the Secretary of Health and Human Services specifically consents to such jurisdiction; and

(II) **no natural parent or prior adoptive parent of any alien provided special immigrant status** under this subparagraph shall thereafter, by virtue of such parentage, **be accorded any right, privilege, or status under this Act**;

What Children with SIJ Status Receive

- Protection from deportation and removal
- Legal permanent residency
- Government issued ID
- Legal work authorization
- Eligibility for driver's license or state ID and social security number
- Eligible for citizenship after 5 years, if at least 18 years old

- SIJS recipient may NEVER file family petition for natural parents

## VIII. U Visa

U visas are available to noncitizens who have been the victims of certain crimes, suffered substantial physical or mental abuse as a result of having been victims of such crimes, and cooperated with law enforcement in the investigation or prosecution of those crimes. INA § 101(a)(15)(U).

**INA § 101(a)(15)(U)(i)** subject to section 214(p), an alien who files a petition for status under this subparagraph, if the Secretary of Homeland Security determines that--

- (I) the alien has suffered **substantial physical or mental abuse as a result of having been a victim of criminal activity** described in clause (iii);
- (II) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) **possesses information concerning criminal activity** described in clause (iii);
- (III) the alien (or in the case of an alien child under the age of 16, the parent, guardian, or next friend of the alien) **has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity** described in clause (iii); and
- (IV) **the criminal activity described in clause (iii) violated the laws of the United States or occurred in the United States** (including in Indian country and military installations) or the territories and possessions of the United States;

**INA § 101(a)(15)(U)(ii)** if **accompanying**, or following to join, the alien described in clause (i)--

- (I) in the case of an alien described in clause (i) who is **under 21** years of age, **the spouse, children, unmarried siblings under 18** years of age **on the date on which such alien applied for status** under such clause, and **parents** of such alien; or
- (II) in the case of an alien described in clause (i) who is **21 years of age or older**, the spouse and children of such alien; and

**INA § 101(a)(15)(U)(iii)** the **criminal activity referred to** in this clause is that involving one or more of the following or any similar activity in violation of Federal, State, or local criminal law: **rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual**



**exploitation; stalking; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; fraud in foreign labor contracting (as defined in section 1351 of title 18, United States Code); or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes;**

Must obtain a certification from a law enforcement official affirming that the U visa applicant was indeed the victim of qualifying criminal activity, he or she possesses information about the crime, and has been, is being, or is likely to be helpful in the investigation or prosecution of the crime, and has not unreasonably refused to provide assistance. 8 C.F.R. § 214.14(c)(2).

- The certifying law enforcement official can be a judge, prosecutor, police officer, or an officer with another agency having criminal investigative jurisdiction, such as Child Protective Services, the Equal Employment Opportunity Commission, or the Department of Labor. 8 C.F.R. § 214.14(a)(2).

Why “Criminal Activity” and Not Limited to “Crimes”?

The INA provides the statutory list of qualifying criminal activity for U nonimmigrant status. INA § 101(a)(15)(U)(iii). This list, however, is not a list of specific statutory violations, but instead a list of general categories of crime. See *New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status*; Interim Rule, 72 Fed. Reg. 53,018 (September 17, 2007). Additionally, this list includes any attempt, conspiracy, or solicitation to commit any of the statutorily listed crimes, including any criminal offense that is substantially similar to one of the listed crimes (8 CFR 214.14(a)(9)), USCIS reviews each U nonimmigrant petition on a case-by-case basis, including all evidence from the victim and law enforcement, to determine whether the criminal activity described in the petition meets the general definition of a qualifying criminal activity.

Who can apply

- Victims of qualifying criminal activity (defined in INA § 101(a)(15)(U)(iii))
- Bystander victimization – very limited. **INA §§ 101(a)(15)(U)(i)(I)** (U-Visa applicant must have suffered “**substantial physical or mental abuse as a result of having been a victim of criminal activity**”) (emphasis added).
- For child victims (under 16) a “next friend” can provide helpfulness. See

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**INA §§ 101(a)(15)(U)(i)(II); (III).**

- **8 C.F.R. § 214.14 - Next friend** means a **person who appears in a lawsuit to act for the benefit of an alien under the age of 16 or incapacitated or incompetent**, who has **suffered substantial physical or mental abuse as a result of being a victim** of qualifying criminal activity. The next friend is **not a party** to the legal proceeding and is **not appointed as a guardian**.
- **Qualifying Family Members. INA § 101(a)(15)(U)(ii).**

Who can certify?

**INA § 101(a)(15)(U)(i)(III) states that a U-Visa applicant must receive certification that she “has been helpful, is being helpful, or is likely to be helpful:**

- **To a Federal, State, or local law enforcement official,**
- **To a Federal, State, or local prosecutor,**
- **To a Federal or State judge,**
- **To the Service, or**
- **To other Federal, State, or local authorities investigating or prosecuting criminal activity described in clause (iii)”**

Form I-918, Supplement B, "U Nonimmigrant Status Certification," **must be signed by a certifying official within the six months** immediately preceding the filing of Form I-918 (Application for U Nonimmigrant Status). 8 C.F.R. § 214.14(c)(2)(i).

- **8 C.F.R. §214.14(a)(3) defines certifying official as, “[t]he head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications** on behalf of that agency” or “a Federal, State, or local judge.”
- **8 C.F.R. § 214.14(c)(2) Certifying agency means a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor.**

Survivors with Criminal or Immigration Violation History

- Unlike VAWA, there are more generous waivers available for U visa

applicants

- U visa applicants can apply for a waiver of all grounds of inadmissibility except for those who are Nazis or perpetrators of genocide, torture, or extrajudicial killing
- Must show that the waiver should be granted in the national or public interest

### The U Visa Process

- Law Enforcement signs certification
- Survivor files U visa application
- DHS adjudication – grants/denies U visa
- U visa or wait-list approval
- Can apply for lawful permanent residency “green card” after 3 years
- Can apply for U.S. citizenship 5 years after “green card”
- Benefits:
  - U visa recipients are lawfully present for federal health care purposes
  - Some states give benefits upon filing of the U visa

### U Visa Facts and Benefits

- Only 10,000 U visas can be granted annually – Currently there is a Wait List
- Work authorization ( ≈ 14-18 months) – Via Deferred Action Status
- The U visa grants a temporary 4 year stay
- Limited state benefits in a few states
- Lawful permanent residency after 3 years if:
  - Continued cooperation or does not unreasonably refuse to cooperate; and
  - humanitarian need, family unity or public interest
- U.S. Citizenship after 5 years of lawful permanent residency+ proof of good moral character

### Which U Visa Recipients Can Obtain Lawful Permanent Residence?

- Did not unreasonably refuse to cooperate in the detection, investigation or prosecution of criminal activity; AND
  - Humanitarian need, OR
  - Family unity, OR
  - Public interest
- Department of Homeland Security review of cooperation and the reasonableness of noncooperation is required for lawful permanent residency

## IX. T Visa

Client must have been victim of (a) sex trafficking of persons (if under age 18, could have been consensual), or (b) labor trafficking, including being made to work by force, fraud, etc.

Available to a noncitizen who can demonstrate that he or she:

- Is or has been a victim of a “severe form of trafficking in persons,” as defined in 22 U.S.C. § 7102(9) (covers the use of fraud, force, or coercion for sex trafficking as well as involuntary servitude, peonage, debt bondage, and slavery.);
- Is physically present in the United States, American Samoa, or the Mariana Islands or at a port of entry on account of trafficking;
- Has complied with any reasonable request for assistance in investigating or prosecuting trafficking (if 18 or older); and
- Would suffer extreme hardship involving unusual and severe harm upon removal.

INA § 101(a)(15)(T).

**INA § 101(a)(15)(T)(i)** subject to section 214(o), an alien who the Secretary of Homeland Security, or in the case of subclause (III)(aa) the Secretary of Homeland Security, in consultation with the Attorney General <sup>4ab3</sup> determines--

- (I) is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000; <sup>4ab3</sup>
- (II) is physically present in the United States, American Samoa, or the Commonwealth of the Northern Mariana Islands, or at a port of entry thereto, on account of such trafficking, including physical presence on account of the alien having been allowed entry into the United States for participation in investigative or judicial processes associated with an act or a perpetrator of trafficking; <sup>4ab3</sup>
- (III)
  - (aa) has complied with any reasonable request for assistance in the Federal, State, or local <sup>4ab2</sup> investigation or prosecution of acts of trafficking <sup>4ab2</sup> or the investigation of crime where acts of trafficking are at least one central reason for the commission of that crime;
  - (bb) in consultation with the Attorney General, as appropriate, is unable to cooperate with a request described in item (aa) due to physical or psychological trauma; or
  - (cc) has not attained 18 years of age; and

(IV) the alien would suffer extreme hardship involving unusual and severe harm upon removal;

**INA § 101(a)(15)(T)(ii)** if accompanying, or following to join, the alien described in clause (i)--

- (I) in the case of an alien described in clause (i) who is under 21 years of age, the spouse, children, unmarried siblings under 18 years of age on the date on which such alien applied for status under such clause, and parents of such alien;
- (II) in the case of an alien described in clause (i) who is 21 years of age or older, the spouse and children of such alien; and
- (III) any parent or unmarried sibling under 18 years of age of an alien described in subclause (I) or (II) who the Secretary of Homeland Security, in consultation with the law enforcement officer investigating a severe form of trafficking, determines faces a present danger of retaliation as a result of the alien's escape from the severe form of trafficking or cooperation with law enforcement.

INA § 214(o)(7) now provides that **T nonimmigrant status *may be extended*** if:

- Federal, State, or local law enforcement official, prosecutor, judge, or other **authority investigating or prosecuting activity relating to human trafficking certifies** that the **presence of the T nonimmigrant** in the United States is **necessary to assist in the investigation or prosecution of acts of trafficking**; or
- USCIS determines that an extension of the period of T nonimmigrant status is **warranted due to exceptional circumstances**.

Amended INA § 214(o)(7) now provides that **USCIS *must extend* T nonimmigrant status**:

- During the **pendency of an application for adjustment of status** under **INA § 245(l) (T Visa Adjustment of Status)**.

Requirements for a T Visa

8 CFR 214.11**(b)Eligibility for T-1 status**. An alien is eligible for T-1 nonimmigrant status under section 101(a)(15)(T)(i) of the Act if he or she demonstrates all of the following, subject to section 214(o) of the Act:

**(1)Victim**. The alien is or has been a victim of a severe form of trafficking in persons.

**(2)Physical presence.** The alien is physically present in the United States or at a port-of-entry thereto, according to paragraph (g) of this section.

**(3)Compliance with any reasonable request for assistance.** The alien has complied with any reasonable request for assistance in a Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, or meets one of the conditions described below.

**(i)Exemption for minor victims.** An alien under 18 years of age is not required to comply with any reasonable request.

**(ii)Exception for trauma.** An alien who, due to physical or psychological trauma, is unable to cooperate with a reasonable request for assistance in the Federal, State, or local investigation or prosecution of acts of trafficking in persons, or the investigation of a crime where acts of trafficking in persons are at least one central reason for the commission of that crime, is not required to comply with such reasonable request.

**(4)Hardship.** The alien would suffer extreme hardship involving unusual and severe harm upon removal.

**(5)Prohibition against traffickers in persons.** No alien will be eligible to receive T nonimmigrant status under section 101(a)(15)(T) of the Act if there is substantial reason to believe that the alien has committed an act of a severe form of trafficking in persons.

A Severe Form of Trafficking in Persons Means:

Severe form of trafficking in persons means sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act is under the age of 18 years; or 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 subjection to involuntary servitude, peonage, debt bondage, or slavery. 8 C.F.R. 214.11(a).

Force, Fraud, or Coercion

- Debt servitude
- Surveillance
- Physical barriers
- Threats to safety
- Physical isolation from protections

- Psychological isolation
- Threats to deport or contact law enforcement

### Trafficking v. Smuggling

#### Trafficking

- Crime against a person
- Contains an element of coercion
- Subsequent exploitation
- Trafficked people treated as victims

#### Smuggling

- Unauthorized border crossing
- No coercion
- Facilitated entry by another person
- Smuggled people treated as criminals

### T Visa Facts and Benefits

- 5,000 T Visas can be granted annually
- The T visa grants a temporary 4 year stay to live and work in the U.S.
- Work authorization ( 6 months- 2/2014)
- Adult: Can petition for victim’s spouse/children
- Under 21 child: Can petition spouse, children, parents + siblings under 18
- Family members can include their children
- Lawful permanent residency after 3 years
- U.S. Citizenship after 5 years of lawful permanent residency+ proof of good moral character

## **X. Asylum, Withholding of Removal and Convention Against Torture**

If client fears harm that amounts to persecution or even torture if returned to the home country, consider all above forms of humanitarian protection. Asylum is preferable, because after one year the person can apply for lawful permanent residence. INA §209(b), 8 USC § 1159(b).

An asylum applicant:

1. must submit the application within one year of entering the U.S., absent extraordinary or changed circumstances,
2. faces stricter bars based upon criminal convictions,
3. can be denied asylum as a matter of discretion, and
4. only needs to prove a “well-founded fear” of persecution (interpreted as a 10% likelihood).

There are various bars to asylum and withholding.

## **XI. Temporary Protected Status (TPS)**

Noncitizens from certain countries that have experienced a devastating natural disaster, civil war or other unstable circumstances may be able to obtain Temporary Protected Status (TPS). See [www.uscis.gov/humanitarian/temporary-protected-status](http://www.uscis.gov/humanitarian/temporary-protected-status) for a list of countries and requirements. There are certain bars, including any two misdemeanors or one felony.

## **XII. NACARA**

Your client might be eligible for a program if he/she (a) is from the former Soviet bloc, El Salvador, Guatemala, or Haiti; and (b) applied for asylum or similar relief in the 1990's or is a dependent of such a person. Certain nationals from El Salvador, Guatemala, or former Soviet bloc countries who applied for asylum or similar relief in the early 1990's are eligible to apply for lawful permanent resident status (a greencard) under the 1997 Nicaraguan Adjustment and Central American Relief Act (NACARA). See 8 CFR §240.60-65. They can apply for a special form of suspension or cancellation of removal now, under the more lenient suspension of deportation standards that were in effect before April 1, 1997. Persons who became deportable or inadmissible for a criminal offense more than ten years before applying for NACARA can apply under the lenient rules governing the former "ten-year" suspension (see §17.15), except that an aggravated felony conviction is an absolute bar to NACARA. See 8 CFR §§ 240.60-61, 65. Family members of these persons also may be eligible to apply.

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### **Screening and Practical Considerations**

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#### **PRELIMINARY QUESTIONS**

- **Do you speak English? If not, what languages do you speak fluently?**
- **What is your immigration status?**
- **Regarding visa applications,**
  - **Have you already filed for any of the following:**
    - **VAWA self-petition**
    - **Cancellation of removal**
    - **U-visa application**
    - **Gender-based asylum application**
    - **T visa application**



- **Has anyone filed any of the following on your behalf:**
  - **I-130 Family-based visa application**
  - **Work Visa authorization**
- **Are you the derivative of someone else in their visa application for any of the following:**
  - **Asylum application**
  - **Refugee application**
- **When did you first arrive in the U.S.? How long have you been here?**
- **Why did you come to the U.S.?**
- **What country do you come from?**
  - **Are you Haitian?**
  - **Are you Salvadoran, Guatemalan, or from Eastern Europe?**
  - **Are you Cuban?**
- **Do you have or have you ever had a work permit or work authorization?**
- **Have you received any of the following assistance:**
  - **TANF-cash assistance**
  - **Medicaid**
  - **Food stamps**
  - **Public or assisted housing**
  - **Other assistance, such as counseling**
- **Is your spouse or parent a veteran?**
- **Did you meet your spouse through an international matchmaking agency?**
- **Do you have children? If yes, what is their immigration status?**
- **Have you ever had a civil protection order against your abuser?**
- **Did you ever go to a doctor for your injuries or for other treatment, including counseling?**
- **Did you tell anyone about the abuse, crime, sexual assault, or trafficking? If so, whom?**
- **Have you ever been detained by anyone? If so, when and by whom?**
  - **By DHS**
  - **By the police**
- **Have you ever been arrested or convicted of a crime?**

**If Undocumented:**

- **If under 16 when entered, screen for possible DACA.**
- **If parent is a USC, screen for possible derivative or acquired citizenship.**
- **If LPR or USC parent, spouse, child, sibling, screen for possible**

**adjustment or consular process options.**

- If **harmed in home country**, screen for **asylum** and related relief.
- If **harmed in the U.S.**, screen for **VAWA and U non-immigrant status**.
- If a **victim of a crime**, screen for **VAWA and U non-immigrant status**.
- If **family member military**, screen for **parole-in-place and naturalization** for military.
- If **under 21**, screen for possible **SIJS**.
- If **brought to work in US or forced into commercial sex act**, screen for **T visa**.
- If **TPS country**, check list here: [www.uscis.gov/humanitarian/temporary-protectedstatus#Countries%20Currently%20Designated%20for%20TPS](http://www.uscis.gov/humanitarian/temporary-protectedstatus#Countries%20Currently%20Designated%20for%20TPS), screen for possible **TPS** or late registration.
- If **been here at least 10 years and has LPR or USC spouse, child or parent**, screen for **cancellation of removal** for non-LPRs (and suspension if only conviction before April 1, 1997).
- If from **El Salvador and entered the U.S. by Sept. 19, 1990 or Guatemala and entered by Oct. 1, 1990**, screen for **NACARA**.
  - Screen children if parents entered by the above dates.

#### **For LPRs:**

- Screen for **naturalization**
- If **parent is a USC or can become a USC by the time client turns 18**, screen for **derivation**
- **If parent or grandparent a USC**, screen for **acquisition**
- If potential deportation:
  - Cancellation of removal; and prior 212(c)
  - If fear of harm in home country, screen for asylum, CAT, withholding
  - If any family members in status, screen for possible re-adjustment as defense

#### **Finding Out About Potential Bars**

- Multiple Interviews with client
- Get records!
  - FOIA: NRC, CBP, ICE, EOIR
  - FBI fingerprint check
  - Arrest records: police report, charging document, final disposition, plea documents/agreements
- General discretion