

U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT

ICE Directive 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners

Issue Date: August 2, 2019

Superseded: 11005.1: *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-Visa) Applicants* (Sept. 24, 2009), and Memorandum from Peter S. Vincent, Principal Legal Advisor, *Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal* (Sept. 25, 2009).

Federal Enterprise Architecture Number: 306-112-002b

- 1. Purpose/Background.** This Directive sets forth U.S. Immigration and Customs Enforcement (ICE) policy regarding Stay of Removal requests and the exercise of prosecutorial discretion to join motions to terminate removal proceedings involving U nonimmigrant status (U visa) petitioners and their qualifying family members. Aliens subject to pending removal proceedings or a final order of removal may apply for a U visa with U.S. Citizenship and Immigration Services (USCIS),¹ and those aliens subject to a final order of removal who have a pending U visa petition may request a Stay of Removal from ICE Enforcement and Removal Operations (ERO), as may any other alien subject to a final order of removal.²

The U visa enables certain removable aliens who are victims of crime to assist law enforcement without fear of removal. The U visa is intended to strengthen the ability of local, state, and federal law enforcement agencies, including ICE Homeland Security Investigations (HSI), to detect, investigate, and prosecute cases of human trafficking, domestic violence, sexual exploitation, female genital mutilation, and other specified criminal activity. Local, state, and federal law enforcement are authorized to complete certifications for victims applying for a U visa; within ICE, HSI Special Agents in Charge (SACs) and the Associate Director (AD) for the Office of Professional Responsibility (OPR) are delegated this certification authority.

- 2. Policy.** It is ICE policy to comply with applicable law governing U visas and to encourage victims of crime to work with law enforcement. Where a U visa petitioner's law enforcement certification is signed by HSI or OPR, ICE will generally grant a Stay of Removal request filed by that alien or join a motion to terminate removal proceedings, accordingly. In cases involving pending U visa petitioners and their qualifying family members in which ICE does not sign the law enforcement certification, ICE ERO Field Office Directors (FODs) and Office of the Principal Legal Advisor (OPLA) attorneys will

¹ 8 C.F.R. § 214.14(c)(1)(i)-(ii).

² Immigration and Nationality Act (INA) §§ 237(d), 241(c)(2).

consider the totality of the circumstances, including any favorable or adverse factors, and any federal interest(s) implicated when determining whether to exercise discretion to grant or deny a Stay of Removal or join a motion to terminate removal proceedings.³ Assistance provided by a U visa petitioner to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of criminal activity will generally be considered a significant favorable factor, but is not necessarily dispositive.

ICE will no longer routinely request *prima facie* determinations nor expedited adjudications from USCIS. An alien with a pending U visa petition whose Stay of Removal request is denied may be processed for removal absent any legal impediment to removal.

Stays of Removal granted to U visa petitioners will generally be granted for an initial period of 180 days and may be extended for additional 180-day periods thereafter, in ICE's discretion. A Stay of Removal will not be granted after USCIS places the U visa petitioner on the waiting list, as such aliens are granted deferred action by USCIS, rendering a stay unnecessary.⁴ A Stay of Removal will not be extended if USCIS denies the U visa and the petitioner exhausts all administrative appeals, in which case ERO may continue to process the alien for removal.

Furthermore, it is ICE policy to respect USCIS's grant of deferred action to a U visa petitioner. Accordingly, ICE will not remove a U visa petitioner or qualifying family member whom USCIS has placed on the waiting list and granted deferred action unless a new basis for removal has arisen since the date of the waiting list placement or USCIS terminates deferred action.

3. **Definitions.** The following definitions apply for purposes of this Directive only.
 - 3.1. **Headquarters Responsible Official (HRO).** The Executive Associate Directors (EADs) for ERO and HSI, and the AD for OPR.
 - 3.2. **Stay of Removal.** A determination in the unreviewable discretion of the Department of Homeland Security (DHS) to temporarily defer the execution of a final order of removal issued to an alien.⁵
 - 3.3. **U Nonimmigrant Status or "U visa."** An immigration benefit available for alien victims of qualifying crimes who have suffered substantial physical or mental abuse as a result of having been a crime victim; have information about the criminal activity; and were helpful, are being helpful, or are likely to be helpful to law enforcement officials in investigating and prosecuting those crimes.⁶

³ ICE officers and agents will make enforcement determinations on a case-by-case basis in accordance with federal law and consistent with DHS and ICE policy.

⁴ See 8 C.F.R. § 214.14(d)(2).

⁵ INA §§ 237(d), 241(c)(2); 8 C.F.R. §§ 241.6(a), 1241.6(a).

⁶ INA § 101(a)(15)(U); 8 C.F.R. § 214.14.

- 3.4. U Nonimmigrant Status Certification, Form I-918, Supplement B, or “U visa certification.”** USCIS Form I-918, Supplement B, *U Nonimmigrant Status Certification*, is completed by a federal, state or local law enforcement agency to certify that the petitioner, among other things, is or has been a direct or indirect victim of qualifying criminal activity; possesses information about the qualifying criminal activity; and has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim. Victims are required to submit Form I-918, Supplement B, as a part of their petition to USCIS.⁷
- 3.5. Waiting List Determination.** A USCIS decision on a U visa petition that is the functional equivalent of a full adjudication on the merits of the petition, including complete fingerprint and background checks and adjudication of any accompanying waivers of inadmissibility. A petitioner is placed on the waiting list when, due solely to the statutory cap, a U-1 nonimmigrant visa is not currently available. When a U visa petitioner is placed on the waiting list, by regulation, USCIS grants deferred action or parole to the alien and any qualifying family members and may afford them employment authorization.⁸
- 4. Responsibilities.**
- 4.1. The HROs and the Principal Legal Advisor** are responsible for ensuring compliance with the provisions of this Directive and issuing any necessary guidance.
- 4.2. HSI and OPR SACs** are responsible, as U visa certifying officials, for signing vetted U visa certifications for alien victims of crime who are helpful in HSI or OPR investigations, on a case-by-case basis and confirming upon request by ERO that HSI or OPR completed a certification for a particular victim.
- 4.3. ERO FODs** are responsible for adjudicating Stay of Removal requests from U visa petitioners.
- 4.4. OPLA Attorneys** are responsible for considering requests from U visa petitioners to join motions to terminate removal proceedings and reviewing for legal sufficiency, as appropriate, HSI or OPR’s final approval or disapproval of an alien’s request for a U visa certification.
- 5. Procedures/Requirements.**
- 5.1. Signing U Visa Certifications.** HSI and OPR will follow the procedures for vetting and signing U visa certifications, as appropriate, for alien crime victims who are helpful to HSI investigations as outlined in HSI HB18-06, *U Nonimmigrant Status (U Visa) Handbook* (Sept. 21, 2018), or as updated and OPR Investigative Guidebook, *Section 3.40.8 U Nonimmigrant Status* (Oct. 2012).

⁷ 8 C.F.R. § 214.14(c)(2).

⁸ 8 C.F.R. § 214.14(d).

5.2. Stay of Removal Requests.

5.2.1 Initiating Stay of Removal Requests. When ICE assumes civil immigration custody of an alien, ERO must determine whether the alien is an applicant or beneficiary of an application or petition for a benefit protected by 8 U.S.C. § 1367, including pending and approved U visas, by consulting the Central Index System database (or any successor information technology system established to assume the same functions).⁹

If the alien has or claims to have a pending U visa petition, the FOD, or designee, upon the alien's request, will provide him or her with Form I-246, *Application for Stay of Removal*, and enter the date of this action in EARM. If the alien does not file a Stay of Removal request within five business days, ERO may continue to process the alien for removal.

5.2.2. Reviewing Stay of Removal Requests. Upon receiving a Stay of Removal request from a pending U visa petitioner for whom HSI or OPR has completed the U visa certification, ERO will verify the U visa certification with the issuing HSI or OPR SAC office. If confirmed, ERO will generally grant the U visa petitioner's Stay of Removal request given the close coordination and information sharing within ICE.

In all other cases, upon receiving a Stay of Removal request from a U visa petitioner, the FOD will consider the totality of the circumstances, any favorable or adverse factors (including the extent and nature of any criminal history), and any federal interest(s) implicated. Assistance provided by a U visa petitioner to law enforcement, prosecutors, judges, or other officials in the detection, investigation, prosecution, conviction, or sentencing of criminal activity will generally be considered a significant favorable factor, but is not necessarily dispositive. Convictions for crimes related to a petitioner's victimization will generally not be considered an adverse factor. ICE will not consider the merits of the U visa petition. ICE will no longer routinely request *prima facie* determinations nor expedited adjudications from USCIS. The fact that a petitioner can continue to pursue a U visa adjudication from outside the United States is not alone a reason for ICE to deny a Stay of Removal request.

As with any other Stay of Removal request, a Stay of Removal is not appropriate when there exist national security concerns, evidence the U visa petitioner is a human rights violator, has engaged in immigration fraud and/or has significantly abused the visa or visa waiver programs, or has a criminal history that evidences that the alien poses a risk to public safety.

5.2.3 Adjudicating Stay of Removal Requests. After careful consideration, if the FOD, in his or her unreviewable discretion, determines that the totality of the circumstances merit a Stay of Removal, the FOD will grant the Stay of Removal for an initial 180-day period,

⁹ DHS Instruction No. 002-02-001, *Implementation of Section 1367* (Nov. 7, 2013); DHS Directive No. 002-02, *Implementation of Section 1367 Information Provisions* (Nov. 1, 2013).

and may then renew it for additional 180-day periods thereafter, so long as no new adverse factors arise.

5.2.4. Memorializing a Discretionary Decision. Upon deciding to grant or deny a U visa petitioner's Stay of Removal request, the FOD will provide the petitioner and the attorney of record, if applicable, with written notice of the decision; place a copy of the notice in the U visa petitioner's A-file; and enter the decision into the ENFORCE Alien Removal Module (EARM).

5.2.5. Detention/Release. As in all cases, if a U visa petitioner is not subject to mandatory detention, and particularly where the FOD has granted a Stay of Removal, FODs should consider whether continued detention is appropriate given the facts and circumstances of the case.

5.2.6. Removal of U Visa Petitioners. The removal of an alien whose Stay of Removal request is denied will continue consistent with current removal policies and procedures.

5.2.7. Effect of USCIS U Visa Waiting List Determination, Approval or Denial on the Stay of Removal. If USCIS places the U visa petitioner on the waiting list, ICE will not grant a further Stay of Removal as the petitioner will have been granted deferred action by USCIS, making the stay unnecessary. Given the grant of deferred action for these U visa petitioners, FODs should consider whether continued detention is necessary or appropriate given the facts or circumstances of the case. Upon approval of a U visa, orders of exclusion, deportation, or removal issued by DHS are deemed cancelled by operation of law as of the date of USCIS's approval of Form I-918.¹⁰ Final orders of removal issued by an immigration judge are subject to reopening for cancellation in light of the U visa approval.¹¹ On the other hand, USCIS's denial of the U visa petition will result in the Stay of Removal being lifted automatically as of the date the denial becomes administratively final.¹²

5.3 U Visa Petitioners in Removal Proceedings.

5.3.1 Petitioning While in Proceedings. Aliens in pending removal, exclusion, or deportation proceedings may petition for a U visa. If an alien in removal proceedings states that he or she has filed a U visa petition with USCIS, provides proof of such filing, and requests that OPLA join a motion to terminate removal proceedings, OPLA will consider on a case-by-case basis whether or not to exercise its discretion to join a motion to terminate proceedings before the immigration judge or the Board of Immigration Appeals while the Form I-918 is being adjudicated.¹³ Determinations of whether to join a motion to

¹⁰ 8 C.F.R. § 214.14(c)(5)(i).

¹¹ Id.

¹² 8 C.F.R. § 214.14(c)(5)(ii).

¹³ 8 C.F.R. § 214.14(c)(1)(i).

terminate in such cases will be made consistent with Section 5.2.2 and relevant OPLA guidance regarding the exercise of prosecutorial discretion.¹⁴

5.3.2 Effect of USCIS U Visa Waiting List Determination, Approval, or Denial on Proceedings. If USCIS places the U visa petitioner on the waiting list while he or she is still in pending removal proceedings, OPLA may move, or join a motion, to dismiss the removal proceedings without prejudice.

If, after a final order of exclusion, deportation, or removal has been issued by an immigration judge, USCIS places the U visa petitioner on the waiting list or approves the petition, OPLA may join a motion to reopen and dismiss proceedings, without prejudice.¹⁵ Orders of exclusion, deportation, or removal issued by DHS are cancelled by operation of law as of the date of USCIS's approval of Form I-918.¹⁶

If USCIS denies the U visa petition and removal proceedings were previously dismissed, then DHS may file a new Form I-862, *Notice to Appear*, to initiate proceedings against the individual.¹⁷

6. Recordkeeping. Records in EARM and PLANet will be retained permanently until the National Archives and Records Administration issue formal guidance.

7. Authorities/References.

7.1. *Victims of Trafficking and Violence Protection Act of 2000*, Pub. L. No. 106-386, 114 Stat. 1464.

7.2. *Violence Against Women and Department of Justice Reauthorization Act of 2005*, Pub. L. No. 109-162, Tit. VIII, 119 Stat. 3053-3077.

7.3. *William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008*, Pub. L. No. 110-457, 122 Stat. 5044.

7.4. *Immigration and Nationality Act of 1952*, as amended (INA), Pub. L. No. 82-414, 66 Stat. 163.

7.5. 8 U.S.C. § 1101(a)(15)(U); INA § 101, U nonimmigrant definition.

7.6. 8 U.S.C. § 1367, Penalties for disclosure of information.

7.7. 8 C.F.R. § 214.14, Alien victims of certain qualifying criminal activity.


¹⁴ See, e.g., Tracy Short, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).

¹⁵ 8 C.F.R. § 214.14(c)(5)(i).

¹⁶ *Id.*

¹⁷ 8 C.F.R. § 214.14(c)(5)(ii).

- 7.8. 8 C.F.R. § 1241.6, Administrative stay of removal.
- 7.9. 8 C.F.R. § 241.6, Administrative stay of removal.
- 7.10. DHS Instruction Number 002-02-001, *Implementation of Section 1367* (Nov. 7, 2013).
- 7.11. DHS Directive 002-02, *Implementation of Section 1367 Information Provisions* (Nov. 1, 2013).
- 7.12. HSI Delegation Order 10006.1, *Authority to Issue U Nonimmigrant Status Certifications within Homeland Security Investigations* (Nov. 18, 2011).
- 7.13. HSI HB 18-06, *U Nonimmigrant Status (U Visa) Handbook* (Sep. 21, 2018).
- 7.14. Department of Homeland Security, *U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies* (Jan. 4, 2016).
- 7.15. Delegation Order 10001.2, *Authority to Issue U Nonimmigrant Status Certifications* (Oct. 4, 2012).
- 7.16. Tracy Short, Principal Legal Advisor, *Guidance to OPLA Attorneys Regarding the Implementation of the President's Executive Orders and the Secretary's Directives on Immigration Enforcement* (Aug. 15, 2017).
- 7.17. OPR Delegation Order 10001.2, *Authority to Issue U Nonimmigrant Status Certifications within the Office of Professional Responsibility* (Oct. 11, 2012).
- 7.18. OPR Investigative Guidebook, *Section 3.40.8 U Nonimmigrant Status* (Oct. 2012).
8. **Attachments.** None.
9. **No Private Right.** This document provides only internal ICE policy guidance, which may be modified, rescinded, or superseded at any time without notice. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter. Likewise, no limitations are placed by this guidance on the otherwise lawful enforcement or litigative prerogatives of ICE.



Matthew T. Albence
Acting Director
U.S. Immigration and Customs Enforcement