

National Network to End Violence Against Immigrant Women
www.immigrantwomennetwork.org

Co-chaired by:

**Immigrant Women Program,
Legal Momentum**
1101 14th Street, NW Suite 300
Washington, DC 20005
(202) 326-0040
iwp@legalmomentum.org

**Family Violence
Prevention Fund**
383 Rhode Island St., Suite
304
San Francisco, CA 94103
(415) 252-8900
leni@endabuse.org

**ASISTA
Immigration Assistance**
515 28th St., Des Moines,
Iowa 50312
(515) 244-2469
www.asistahelp.org
questions@asistahelp.org

SUMMARY OF U ADJUSTMENT REGULATIONS

Regulations Issue Date: December 12, 2008

Effective Date: January 12, 2009

This analysis is intended to amplify your reading of the regulations and statute. It is not a substitute for reading the regulation and the supplementary information (preamble). You may find the regulations at this link: <http://edocket.access.gpo.gov/2008/E8-29277.htm>, *73 Fed. Reg. 75540-75564 (December 12, 2008) (to be codified at 8 C.F.R. 245.23 and 245.24)*. This document is a summary for those with immigration practice background. If you are an advocate or filing this petition on your own behalf, we recommend you consult with an attorney or accredited representative who is familiar with the statute and regulations. If you don't know such a person, the Network may be able to connect you with someone. If you qualify for technical assistance from our agencies, you may consult with one of our attorneys. Technical assistance is available through ASISTA and Legal Momentum's Immigrant Women Program using the contact information above. If you are a member of the National Immigration Project of the National Lawyers Guild, you may also obtain technical assistance by emailing Ellen Kemp at ellen@nationalimmigrationproject.org. If you are an affiliate of Catholic Legal Immigration Network (CLINIC), you may obtain technical assistance by calling the immigration information support line.

BASIC ELIGIBILITY REQUIREMENTS FOR U VISA ADJUSTMENT (New 8 CFR 245.24(b))

Adjustment is available to an applicant who:

- Applies for such adjustment;
- Was lawfully admitted to the United States as a U nonimmigrant
- Continues to hold U nonimmigrant status at the time of application (or accrued at least 4 years in U interim relief status and files a complete adjustment application within 120 days of the date of approval of the Form I-918)
- Has continuous physical presence for 3 years since the date of admission as a U nonimmigrant;
- Is not inadmissible under INA 212(a)(3)(E);
- Has not unreasonably refused to provide assistance provide assistance to an official or law enforcement agency that had responsibility in an investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status, as determined by the Attorney General, based on affirmative evidence; and

- Establishes to the satisfaction of the Secretary that the applicant's presence in the United States is justified on humanitarian grounds, to ensure family unity, or is in the public interest.

Exception: Applicants are not eligible for adjustment if their U nonimmigrant status has been revoked. New 8 CFR 245.24(c).

NOTE: Adjustment applications will be submitted to and adjudicated by the Vermont Service Center. Adjustment interviews *may* be conducted at local CIS offices but this will *not* be standard procedure.

DOCUMENTATION REQUIREMENTS FOR U VISA ADJUSTMENT (New 8 CFR 245.24(d))

- Form I-485, Application to Register Permanent Residence or Adjust Status;
- Form I-485 Supplement E which will include additional instructions for U visa holders
- Form I-485 filing fee of \$930 or a fee waiver request;
- Biometric services fee of \$80 or a fee waiver request;
- Photocopy of the applicant's U nonimmigrant status approval notice;
- Photocopy of all pages of all of the applicant's passports valid during the required period (or equivalent travel document or a valid explanation of why the applicant does not have a passport) and documentation showing the following:
 - The date of any departure from the United States during the period that the applicant was in U nonimmigrant status;
 - The date, manner, and place of each return to the United States during the period that the applicant was in U nonimmigrant status; and
 - If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to assist in the investigation or prosecution of the criminal activity or were otherwise justified;
- Copy of the applicant's Form I-94, Arrival-Departure Record;
- Evidence that the applicant was lawfully admitted in U nonimmigrant status and continues to hold such status at the time of application;
- Evidence pertaining to any request made to the applicant by an official or law enforcement agency for assistance in the criminal investigation or prosecution, and the applicant's response to such request [see more details about this below];
- Evidence, including an affidavit from the applicant that he or she has continuous physical presence for at least 3 years [see more details about this below]. This should include a signed statement from the applicant attesting to continuous physical presence – although that alone will not be sufficient to establish this eligibility requirement. If additional documentation is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge who can attest to the applicant's continuous physical presence by specific facts;
- Evidence establishing that approval is warranted. Any other information required by the instructions to Form I-485 Supplement E, including whether adjustment of status is

warranted as a matter of discretion on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

- Evidence relating to discretion. An applicant has the burden of showing that discretion should be exercised in his or her favor. Although U adjustment applicants are not required to establish that they are admissible under INA 212, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application. Where adverse factors are present, an applicant may offset these by submitting supporting documentation establishing mitigating equities that the applicant wants USCIS to consider when determining whether or not a favorable exercise of discretion is appropriate. Depending on the nature of the adverse factors, the applicant may be required to clearly demonstrate that the denial of adjustment of status would result in exceptional and extremely unusual hardship. Moreover, depending on the gravity of the adverse factors, such a showing might still be insufficient. For example, USCIS will generally not exercise its discretion favorably in cases where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse committed upon a child, or multiple drug-related crimes, or where there are security- or terrorism-related concerns.
- NOTE: Form I-601 will *not* be submitted, as the only applicable inadmissibility ground – INA 212(a)(3)(E) cannot be waived!

BASIC ELIGIBILITY REQUIREMENTS FOR PETITIONING FOR FAMILY MEMBERS (New 8 CFR 245.24(g))

A principal U visa holder may file an immigrant petition for a family member if:

- The qualifying family member has never held U nonimmigrant status;
- The qualifying family relationship exists at the time of the principal U visa holder's adjustment and continues to exist through the adjudication of the adjustment or issuance of the immigrant visa for the qualifying family member;
- The qualifying family member or the principal U visa holder would suffer extreme hardship as described in 8 CFR 245.24(g) if the qualifying family member is not allowed to remain in or enter the United States; and
- The principal U visa holder has adjusted status to that of a lawful permanent resident, has a pending application for adjustment of status, or is concurrently filing an application for adjustment of status.

DOCUMENTATION REQUIREMENTS FOR FILING PETITIONS FOR QUALIFYING FAMILY MEMBERS (New 8 CFR 245.24(h))

- Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant;
- I-929 filing fee of \$215 or fee waiver request;
- Evidence of the relationship, such as a birth or marriage certificate. If primary evidence is unavailable, secondary evidence or affidavits may be submitted;
- Evidence establishing that either the qualifying family member or the U visa holder would suffer extreme hardship if the qualifying family member is not allowed to remain

in or join the principal in the United States [see more detail about extreme hardship below]

TRANSITIONAL RULE FOR INTERIM RELIEF RECIPIENTS WITH 4+ YEARS OF STATUS

Those who have already accrued 4 years in U interim relief status must apply to adjust status within 120 days of the I-918 approval. New 8 CFR 245.24(b)(2)(ii). They do not have to wait to receive the I-918 approval notice – they may file the adjustment now. If they have already filed the I-918, then USCIS will adjudicate the adjustment when the I-918 is approved. New 8 CFR 245.24(b)(2)(ii).

PROVING 3 YEARS CONTINUOUS PHYSICAL PRESENCE

Departures from the United States for more than 90 days or for any periods exceeding 180 days in the aggregate will cut off continuous physical presence. New 8 CFR 245.24(a)(1); see INA 245(m)(2). The only exceptions are if the excessive absence is necessary to assist in the investigation or prosecution of the crime or if an official involved in the investigation or prosecution certifies that the absence is otherwise justified. *Id.*

Documentation of continuous physical presence must include an affidavit by the applicant attesting to the continuous physical presence. Other evidence may include: documents issued by any governmental or nongovernmental authority with the name of the applicant, date, and signature, seal, or other authenticating instrument of the authorized representative of the issuing authority if available; college transcripts or employment records, income tax returns, to show that he or she attended school or worked in the United States throughout the entire 3-year U nonimmigrant status period, installment payments, monthly rent receipts or utility bills that cover the same 3-year period. 8 CFR 245.22. If this evidence is not available, the applicant must explain why in an affidavit and provide additional affidavits from others with first-hand knowledge regarding the applicant's continuous physical presence. New 8 CFR 245(d)(5) and (6).

PROVING CLIENT HAS NOT UNREASONABLY REFUSED TO ASSIST IN INVESTIGATION OR PROSECUTION

There is an imposed ongoing requirement to not refuse unreasonably to provide assistance. For derivatives, this means that they if they possessed information about the crime, and are asked to assist they have a responsibility to not unreasonably refuse to provide assistance. Preamble at 25. "Refusal to provide assistance" is defined as refusal to provide assistance *after* being granted U nonimmigrant status (emphasis added). New 8 CFR 245.24(a)(5).

Determination of the reasonable of a refusal will be made by the AG and will be based on all affirmative evidence and the totality of circumstances. New 8 CFR 245.24(a)(5). Factors include:

- general law enforcement, prosecutorial, and judicial practices

- kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud
- nature of the request to the applicant for assistance
- nature of the victimization
- the applicable guidelines for victim and witness assistance
- specific circumstances of the applicant, including fear, severe physical or mental trauma
- age and maturity of the applicant.

How to document reasonableness:

Option one: Submit a document signed by an official or law enforcement agency. New 8 CFR 245.24(e)(1). The document should affirm that the applicant complied with (or did not refuse to comply with) reasonable requests for assistance in the investigation or prosecution during the requisite period. New 8 CFR 245.24(e)(1). This may be done by submitting a newly executed Form I-918, Supplement B, “U Nonimmigrant Status Certification.” New 8 CFR 245.24(e)(2). This option supposedly simplifies the process and avoids delays in adjudication because USCIS would not need to refer the application to DOJ absent extraordinary circumstances.

Option two: Submit an affidavit describing the applicant’s efforts to obtain a newly executed I-918 Supp B or other evidence describing whether or not the applicant received a requests to provide assistance and the response to any such request. New 8 CFR 245.25(e)(2). This should include a description of all instances of which the applicant is aware in which the applicant was requested to provide assistance in the criminal investigation or prosecution of persons in connection with the qualifying criminal activity after the applicant was granted U nonimmigrant status and how the applicant responded to such requests. Id. Applicants should also include, when possible, identifying information about the law enforcement personnel involved in the case and any information of which the applicant is aware about the status of the criminal investigation or prosecution, including any charges filed and the outcome of any criminal proceedings, or whether the investigation or prosecution was dropped and the reasons. Id. Depending on the circumstances, evidence might include such documentation as court documents, police reports, news articles, copies of reimbursement forms for travel to and from court, and affidavits of other witnesses or officials. Preamble at 27.

Option three: If applicable, an applicant also may choose to provide a more detailed description of situations where the applicant declined to comply with requests for assistance because the applicant believed that the failure to comply with such requests for assistance was reasonable under the circumstances. New 8 CFR 245.24(e)(2)(ii). This option is subject to review by DOJ.

Note: The requirement that the application need to show that she did not unreasonably refuse to provide assistance (that the burden of showing this is on her) is ultra vires and will be challenged by the Network. It may also be less of an issue or be changed in guidance as a result of TVPRA. However, Option Two can be used and it is possible that it will be fairly easy to have an approval with a small amount of documentation for this.

Process for determining reasonableness:

Some applications will be referred to DOJ for a determination of whether the applicant has unreasonably refused to comply with a request for assistance in an investigation or prosecution. New 8 CFR 245.24(e)(4). This will likely only happen if the certifying official or agency has provided evidence of a refusal to assist or if there is other evidence in the record suggesting an unreasonable refusal to assist. New 8 CFR 245.24(e)(4). DOJ has 90 days to provide a written determination to USCIS or ask for an extension of time. New 8 CFR 245.24(e)(4). After that, USCIS may adjudicate the application regardless of whether DOJ has provided a response. Id.

ADDITIONAL ADJUSTMENT ISSUES

INA 245(m) is a stand-alone adjustment provision and not a variation of INA 245(a). New 8 CFR 245.24(l). Therefore the restrictions under INA 245(a) and INA 245(c) do not apply.

There is no numerical cap on U visa adjustments. They will be handled on a first in, first out basis. Preamble p 57.

USCIS has sole jurisdiction over the adjudication of U visa adjustments. 8 CFR 245.24(f). Therefore, adjudication and denials of adjustment applications cannot be reviewed by an IJ.

The inadmissibility grounds under INA 212 do not generally apply to U visa adjustment applicants. The only exception to this is INA 212(a)(3)(E) which is not waivable. INA 245(m)(1). Otherwise U visa folks do not have to show admissibility *at adjustment* under any of the other grounds in INA 212(a)! However, they are subject to the grounds of inadmissibility at admission at the border (for example if they travel outside the United States and wish to return).

U adjustment is a discretionary benefit. The burden is on applicants to show that they merit a favorable exercise of discretion. New 8 CFR 245.24(d)(11). The preamble to the regs say that family ties, hardship, and length of residence in the United States may be sufficient to merit a favorable exercise of administrative discretion. Preamble at 33. However, if there are adverse factor present, they must be offset with mitigating factors and may require a showing that denial of the adjustment would result in exceptional and extremely unusual hardship. New 8 CFR 245.24(d)(11). Even that might be insufficient where the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse of a child, multiple drug-related crimes, or where there are security- or terrorism-related concerns. 8 CFR 245.24(d)(11). Those applications may only be approved where “the most compelling positive factors” are present. Preamble at 33.

APPROVALS AND DENIALS

U adjustment approvals come in the form of a written decision. New 8 CFR 245.24(f). The applicant will then get a notice to go to a local USCIS office or Application Support Center to complete a Form I-89 which will be used to make the green card. The approval notice will also tell the applicant how to get temporary evidence of LPR status. New 8 CFR 245.24(f)(1). LPR status will be recorded as of the date of the adjustment approval. New 8 CFR 245.24(f)(1).

U adjustment denials will come in the form of a written decision. Denials can be appealed to the AAO. New 8 CFR 245.24(f)(2). However, denials cannot be renewed or filed before an IJ in removal proceedings. New 8 CFR 245.24(k).

ADJUSTMENT PROCEDURE FOR FAMILY MEMBERS

[NOTE: The procedure for derivative family members in lawful U status (for example, U derivatives who got lawful U-2, U-3, U-4 or U-5 nonimmigrant status) is the same adjustment procedure as the principal U visa holders described above. The description below applies only to qualifying family members who have never had U nonimmigrant status.]

Once the U principal applicant has been granted adjustment, USCIS may grant LPR status to certain spouses, children and parents. INA 245(m)(3). [Practice pointer: Siblings will only be able to adjust if they were derivatives who got U nonimmigrant status]. This is only for family members who did not get their own U nonimmigrant status as a derivative and where there would be extreme hardship if the family members were not allowed to remain or be admitted to the United States. INA 245(m)(3). It is a two-step process.

Step One:

The principal applicant files an immigrant petition on behalf of the qualifying family member New 8 CFR 245.24(h). This is filed on Form I-929 with a \$215 fee (each) or fee waiver request (New 8 CFR 245.24(h)(1)(ii)) and evidence establishing the relationship. New 8 CFR 245.24(h)(1)(iii). Secondary evidence may be submitted where primary evidence is not available. 8 CFR 103.2(b)(2). The Form I-929 may be filed concurrently with the principal applicant's I-485 or after. However, the Form I-929 cannot be approved until the principal's I-485 has been approved. New 8 CFR 245.24(h)(2). The burden is on applicant to include evidence that the qualifying family member or the principal U applicant would suffer extreme hardship as described in New 8 CFR 245.24(h)(1)(iv). USCIS will consider all credible evidence and evaluate as a matter of discretion on a case by case basis. New 8 CFR 245.24(h)(1)(iv).

Step Two:

If the immigrant petition is approved, qualifying family members may adjust status if in the United States or go to a U.S. embassy or consulate for an immigrant visa if outside the United States. New 8 CFR 245.24(h).

- Upon approval of Form I-929 for a family member who is *inside the United States*, the family member is eligible to apply for adjustment. Upon submitting the qualifying family member's Form I-485, that person can also obtain work authorization under category (c)(9). 8 CFR 274a.12(c)(9). The Form I-765 filing fee can be waived. 8 CFR 103.7(c)(5)(i). Biometrics will be required for each person age 14-79 inclusive. Adjustment and biometrics fees may be waived. New 8 CFR 245.24(d)(3).

- Upon approval of Form I-929 for a family member who is *outside the United States*, USCIS will forward the approval notice to NVC for consular processing or to a POE for a visa exempt immigrant. New 8 CFR 245.24(h)(2)(i)(A). Those who will enter with an

immigrant visa must still show admissibility before CBP at the border and therefore will be subject to all of INA 212(a) at that time.

If the I-929 is denied, USCIS will notify the applicant in writing and this can be appealed to the AAO. New 8 CFR 245.24(10)(2)(ii).

TRAVEL ISSUES

Applicants with a pending adjustment application must obtain advance parole to travel. 8 CFR 245.2(a)(4)(ii)(B). This can be requested on Form I-131 before departing the United States. New 8 CFR 245.24(j), 245.2(a)(4)(ii)(B). If the applicant does not obtain advance parole, USCIS will deem the adjustment application abandoned upon departure from the United States. New 8 CFR 245.24(j), 245.2(a)(4)(ii)(A), and that immigrant will be treated as an applicant for admission subject to INA 212 and 235.

Clients should be strongly advised to wait to travel until we see published policy on this making it clear that travel is safe and that there is a process in place for ensuring their reentry into the United States. It is very possible that otherwise client may be stuck outside the country.