Advanced U Visa Issues

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INTRODUCTION

With few avenues of immigration relief and comprehensive immigration reform a distant dream, the U visa provides a welcome avenue of protection from deportation and a path to citizenship. With only 10,000 U visas available each year, a waitlist has been established that at least provides deferred action and employment authorization for those in the United States. This practice advisory aims to help practitioners identify the U visa option for their clients with the first step: a potentially challenging certification process. Other advanced issues that will be discussed with the U visa process are the Immigration Court overlay, the forgiving U visa waiver, the many family members that might derive status from the principal applicant, and challenges when applying for lawful permanent residency.

PUSHING THE ENVELOPE ON U CERTIFICATIONS

The U visa certification, also the Form I-918 Supplement B, is the first and required hurdle for the U visa process.[1] As such, USCIS will reject any U visa application upon receipt that does not include this form. Practitioners therefore will pursue the certification before advancing in the representation for a client. With straightforward cases and experienced certifiers, this step can go smoothly. Here, we discuss potential roadblocks and solutions for obtaining the certification.

DOL and Other Non-Traditional Certifiers

Over the past decade, certifiers from a wide swath of the victim-serving community have joined the traditional certifiers from the police departments, sheriff's offices, and District Attorney's (DA) offices. The U visa regulations describe the broad group of those eligible to sign the form as "a Federal, State, or local judge; […] a Federal, State, or local law enforcement agency, or prosecutor, judge or other authority, that has responsibility for the detection, investigation, prosecution, conviction, or sentencing of qualifying criminal activity…"[2] In the Interim Rule to the regulations, USCIS further specifies examples of other authority with the following: Children Protective Services (CPS), the Equal Employment Opportunities Commission (EEOC), and the Department of Labor (DOL).[3] By now, most of the traditional law enforcement agencies (police, sheriff, and DA) throughout the country understand their authority to review and sign certifications under their discretion; however, both advocates and agencies are still learning who qualifies as a non-traditional certifier.

The Department of Labor (DOL) under Secretary Hilda Solis announced their official U visa policy in 2011[4]. The announcement opened the door for victims of labor-based crimes to pursue an official avenue to immigration relief for their cooperation in DOL's detection, investigation, and/or prosecution of these crimes. Each local DOL office has a designated U visa certifier who responds to requests for U visa certifications from victims and their advocates. Even before a crime has been reported, advocates may connect the victim with the DOL's certifier to begin the detection and investigation of the crime, jumpstarting the process toward assessing the viability of a signed certification. With the Trump administration in 2017, there has been no indication yet (as of the time of writing this Advisory in March 2017) that the DOL's procedures will change.

Detection is one of the qualifying acts that often gets lost in the realm of actions that the certifier may have taken of the group: "detection, investigation, prosecution, conviction, or sentencing".[5]

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[1] 8 CFR § 214.14 (c)(2)(i)
[2] *Id.*
[3] DHS Interim Rule, Billing Code: 4410-10 [CIS No. 2170-05] DHS Docket No. USCIS-2006-0069 at page 23.
[4] Available at: *www.dol.gov/opa/media/press/whd/whd20110619.htm*
[5] 8 CFR § 214.14 (c)(2)(i)

For example, with child abuse, the local CPS may only have the authority to "detect" the crime, whereas only the police department and district attorney have the ability to investigate, convict and sentence. In the case where *only* detection occurred by CPS, then the only potential certifier would be CPS. Similarly, with domestic violence, the local judge in a temporary restraining order hearing may detect the domestic violence, which never reaches the investigative or prosecutorial levels of local law enforcement. Therefore, in that case, that family court judge has the authority to sign a U visa certification. Often it takes an advocacy campaign or simply some education for non-traditional certifiers to come on board.

For a list of certifiers that advocates nationwide have approached, whether successfully or not, the Immigration Center for Women and Children (ICWC) hosts a national web-based information-sharing platform.[6] More than 1,000 members share their experiences with different certifiers on this site. There one can find the different types of certifiers, and share any new certifier who has been convinced to begin reviewing certifications. Membership is free for advocates with non-profit organizations or those doing U visas on a pro bono basis.

Qualifying Criminal Activities That Are Off the Charts

The law provides 28 qualifying criminal activities for the U visa.[7] With passage of the Violence Against Women Reauthorization Act of 2013, the following two additional crimes were added for U visa relief: stalking and fraud in foreign labor contracting. Those two crimes have not yet been added to the certification form with the other 26 crimes.

Practice Pointer: You may simply write-in these additional crimes in the "Other" box on the form. One way to educate certifiers who are unaware of this change (and with other challenging certifications), you may wish to refer them to the U and T Visa Law Enforcement Resource Guide.[8]

The law also provides for "any similar activity"[9] to those in the list of 28. Advocates have been successfully and creatively framing the legal argument to both certifiers and USCIS for the following crimes: Felony-level Hit and Run, Felony Robbery with Force, and Domestic Violence Related Restraining Order Violations.

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[6] ICWC U Visa Zoho Database: *icwclaw.org/services-available/icwc-u-travel-and-certifier-database*
[7] INA 101(a)(15)(U)(iii)
[8] DHS's U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies, available at *www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf*
[9] INA 101(a)(15)(U)(iii)

Victims of Crime with Their Own Criminal Records

Certifiers have limited time and resources to review U visa certification requests and may seek to limit which cases deserve their review, including those of victims with their own criminal history. Certifiers have wide discretion on which cases they review and sign. Some have chosen to categorically exclude victims with criminal histories in order to provide the limited number of U visas to those who they consider the most deserving victims. Be prepared for this approach.

Practice Pointer: If your client has a criminal record that may be reviewed by the certifying officer, you may wish to affirmatively address this issue in your certification request. You should include evidence of your client's equities and hardships. When appropriate, you should show how your client takes responsibility for his or her actions, feels remorse, and has rehabilitated. Often, you may be able to connect the victimization in the U visa crime to the criminal activity that your client was involved in. Many certifiers can recognize when domestic violence victims have acted in self-defense or got arrested themselves due to miscommunication because they lacked an interpreter. Often the advocate must explain how trauma from childhood may contribute to later criminal behavior by child abuse victims. More broadly, do not forget to gently remind the certifier:

1. USCIS reviews the victim's criminal record and entire merits of the case based on the totality of the circumstances. The certifier is not granting status; but instead certifying to the victimization of that particular crime and the victim's involvement and cooperation.
2. For those officers who fear that certifying a marginal case will steal a spot from a stronger case -- Although there are only 10,000 U visas granted per year, USCIS places applicants on a waitlist in the meantime with access to work authorization. While not signing certain categories of certifications could improve the *wait time* for the wait list, there is a limitless number of spots on the waitlist.

SEEKING U VISAS WHILE IN IMMIGRATION COURT AND DEALING WITH AGENCY DELAYS

In light of increasingly aggressive immigration enforcement, the reality is that many of our clients have been or will be placed in proceedings. This includes individuals who had previously not been prioritized for enforcement such as victims of crimes like domestic violence, those who have deferred action[10] and others who may have immigrations petitions pending before USCIS. It will be important to quickly identify all possible forms of relief, but especially whether clients may be U Visa eligible as it is oftentimes the only successful option due to its generous waiver

[10]https://www.whitehouse.gov/the-press-office/2017/01/25/executive-order-border-security-and-immigration-enforcement-improvements

for inadmissibilities. The adjudication of the U visa currently suffers from severe delays. Practitioners report experiencing processing times of over two years for a client to be waitlisted and an additional 2-3 years to obtain actual U nonimmigrant status.[11] Similar historic delays are impacting the immigration courts; currently cases are pending on average nationwide approximately 677 days[12]. In light of these long delays, it can be difficult for practitioners to navigate the immigration court system for U visa eligible clients who are in proceedings.

Practice Pointer: Determining what strategy is best for your client will vary by jurisdiction because it will depend on the practice of your local court. The most important tip for practitioners is to know your local immigration judges and Department of Homeland Security trial attorneys. In the best-case scenario, practitioners will be able to terminate removal proceedings. Whether or not a judge is amenable to a termination will likely be strongly influenced by DHS' position. Practitioner should contact DHS counsel before the next hearing to assess whether DHS might join or oppose the motion. If you are unable to communicate with DHS or if they express opposition, you may still want to file a motion prior to the hearing depending on the preference of the immigration judge. It will be important to establish that your client is eligible for the U visa so you will want to file the I-918 prior to requesting termination and attach the receipt notice to the motion or bring proof of the I-918 filing to the master calendar hearing.

However in many jurisdictions, DHS will not be willing to join in a motion to terminate and a judge may not be willing to grant termination until your client is placed on the U visa waitlist and in deferred action or is actually granted U nonimmigrant status. Another option is to request administrative closure upon filing of the I-918 and then move to terminate proceedings once your client has received deferred action or U nonimmigrant status. If neither strategy is successful, practitioners could request a continuance set out as far as possible until USCIS adjudicates the I-918; it is recommended to bring a printout of the most recent case processing times from www.uscis.gov to argue for a continuance farther out. Oftentimes our clients may be under an order of supervision and have to wear an electronic monitoring device. Practitioners should attempt to negotiate with ICE to remove the monitoring device and end supervision or at least reduce the number of ICE check-ins by demonstrating that the I-918 has been filed and the client has been attending court.

On a final note, if your client is in danger of immediate removal, practitioners are strongly advised to consider filing a stay of removal so that the client is able to remain in the United States while their I-918 is being processed. If your client is in proceedings or detained in ICE custody, the Vermont Service Center (VSC) can issue a prima facie determination (PFD) so that your client may be released from detention and/or be granted a stay of removal. However, VSC

[11] https://egov.uscis.gov/cris/processingTimesDisplay.dois

[12] http://trac.syr.edu/phptools/immigration/court_backlog/about_data.html

will only issue a PFD by request of DHS counsel, not the respondent[13]. The prima facie determination should be grounds for ICE to use its discretion and grant a stay for those who have outstanding orders of removal. In addition, DHS counsel should be requesting that USCIS expedite the administrative case[14]. Practitioners should also take note that immigration judges should be using their discretion to grant continuances for individuals with pending U Visa applications[15]. Finally, practitioners can ask that VSC expedite the processing of the I-918 when they file by making such a request in their cover letter, demonstrating that the client is in proceedings and/or detained and asking for supervisory review; however, practitioners report limited success with this request.

DISTINGUISHING BETWEEN INA §212(d)(14) AND §212(d)(3)(A) WAIVERS

In order for your client to obtain U nonimmigrant status, they must not only establish that they are statutorily eligible under INA §101(a)(U)(15) but that they are also admissible per INA §212. If a client is deemed inadmissible under a §212 ground they will not be granted U status unless they are able to obtain a waiver.[16] Per USCIS regulation, there are two waivers potentially available to U visa petitioners seeking relief.[17] There is a general catch-all waiver for those seeking non-immigrant visas found under INA §212(d)(3)(A); it can waive almost any admissibility except for some relatively rare inadmissibility grounds pertaining to sabotage, espionage, genocide, and participation in Nazi persecution[18]. This waiver can be granted both at the discretion of the Attorney General[19] as well as by the USCIS[20]. The INA does not specify a standard for discretionary waivers under 212(d)(3)(A), but in *Matter of Hranka* the Board of Immigration Appeals (BIA) analyzed this provision and created a balancing test with three factors: 1) the risk of harm to society if the applicant is admitted 2) the seriousness of the applicant's prior immigration law, or criminal law, violations; and 3) the nature of the applicant's reasons for wishing to enter the United States[21]. While the waiver is potentially generous, winning a 212(d)(3)(A) waiver can be difficult, especially for applicants with serious criminal convictions or immigration violations.

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[13] https://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf

[14] https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf; https://www.ice.gov/doclib/detention-reform/pdf/aliens-pending-applications.pdf

[15] On June 7, 2012, the BIA issued a decision on when an Immigration Judge should grant a request for a continuance of removal proceedings to await the decision on a U nonimmigrant status application. *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012).

[16] INA §212(a)

[17] 8 C.F.R §212.17(a), (b)

[18] INA § 212(d)(3)(A) waiver is unavailable to waive inadmissibility under INA §§ 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), (3)(E)(i), and (3)(E)(ii).

[19] INA § 212(d)(3)(A)

[20] USCIS may grant waiver under 212(d)(3), except where the ground of inadmissibility arises under sections 212(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), or (3)(E) of the Act, 8 U.S.C. 1182(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), or (3)(E).

[21] *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978)

A second waiver, INA §212(d)(14), is even broader than the 212(d)(3)(A) waiver and gives the Secretary of the Department of Homeland Security discretion to waive potentially any inadmissibility except participation in Nazi persecution, genocide or extrajudicial killings[22]. The broad nature of this waiver was designed to allow U Visa petitioners, who are victims of serious crimes, to obtain lawful status where they otherwise would not be able. The grounds for this waiver are obliquely described as being "in the public or national interest."[23] Though the regulations permit USCIS in its discretion to consider applications for waivers of inadmissibility under both provisions, it is noted that the INA was amended to include INA § 212(d)(14) as part of the TVPRA of 2000[24] that created the U and T nonimmigrant visas. The addition of a separate basis for granting a waiver with the broader "national or public interest" standard indicates Congressional intent to add authority for USCIS to grant waivers, not to duplicate or heighten the standards a U visa petitioner must meet. In fact, the Seventh Circuit in *L.D.G. vs. Holder* discussed precisely the nature of the relationship between these two waivers in deciding the question of which agencies have jurisdiction to grant an I-192 waiver for U visa petitioners. In *L.D.G. v. Holder*, the court noted that the waiver under subsection (d)(14) was added subsequent to the already existing subsection (d)(3) basis for waiver and provided more expansive waiver power than what was available to the Attorney General under (d)(3). Subsection (d)(14) for U visa applicants, therefore, "was necessary and not redundant insofar as it created an even greater power to grant a waiver of inadmissibility for purposes of a U Visa than was available in the pre-existing catch-all provision. Far from repealing section 1182(d)(3)(A), the newer provision was a context-specific enhancement." *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014).

Misapplying the Hranka Factors to 212(d)(14) Waivers

Currently, there is no precedential case law or regulation either interpreting what constitutes the "public or national interest" requirement or laying out a standard for this waiver. This lack of standard might explain why USCIS has repeatedly, and inappropriately, cited the *Hranka* factors in denying I-192 applications filed in connection with the U Visa, as reported by many practitioners. USCIS should not be misapplying a standard for a waiver that is narrower than the 212(d)(14) waiver for U Visa petitioners. USCIS's reliance upon the *Hranka* factors to analyze an application made under INA § 212(d)(14) renders the existence of a separate waiver ground meaningless and contravenes the intention of subsection (d)(14) to delegate USCIS broader authority to grant waivers for U visa applicants than previously existed under subsection (d)(3) alone. On this basis, the adjudication of the 212(d)(14) waiver should be more generous in waiving inadmissibility than a 212(d)(3)(A) waiver and practitioners should keep this in mind when making their case.

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[22] INA § 212(a)(3)(E)

[23] INA § 212(d)(14)

[24] *Victims of Trafficking and Violence Protection Act of 2000* [United States of America], Public Law 106-386 [H.R. 3244], 28 October 2000.

Practice Pointer: U visa petitioners can apply for either waiver by filing Form I-192 with USCIS[25]. In addition to raising the filing fee to $930, the form has recently been amended to include the 212(d)(14) ground. However, it does not allow the applicant to specify under which ground they are applying. This lack of clarity in both the form and the standard for the 212(d)(14) waiver results in USCIS using inappropriate bases to deny U Visa-based I-192 waivers. Therefore, practitioners should specify in their cover letter and write-in on the I-192 form under which ground they are seeking waiver. Specifying the ground will enable practitioners to better appeal negative decisions. Practitioners should challenge USCIS' application of the *Hranka* factors to a 212(d)(14) waiver application as an inappropriate application of the law and advocate for a more generous waiver standard than the one applied to the 212(d)(3)(A) waiver.

Appealing Waivers

Unfortunately in challenging USCIS' denials of I-192s, practitioners face the difficult hurdle of being limited to USCIS as the final arbiter of review. The statute and regulations are clear that the I-918, U adjustment and the 212(d)(14) waiver are under the exclusive jurisdiction of the USCIS[26]. There is no meaningful review for the U Visa or its accompanying waiver. Although the Seventh Circuit has found that an immigration judge may also adjudicate a 212(d)(3)(A) waiver filed by a U Visa petitioner[27], the BIA has resoundingly rejected that finding and recently ruled that immigration judges do not have authority to adjudicate a request for a waiver of inadmissibility under section 212(d)(3)(A)(ii) in connection with a U Visa petition[28]. To date, no other Circuits have ruled on this issue.

Practice Pointer: In order to circumvent USCIS' exclusive jurisdiction, practitioners could attempt to file waivers under both provisions with the hope that a denial of the 212(d)(3) waiver might be appealed in the courts. However, outside the Seventh Circuit, that would necessitate challenging the BIA's recent decision and would require ultimately appealing to the Circuit courts.

SPECIAL CONSIDERATIONS FOR DERIVATIVES AND AFTER-ACQUIRED FAMILY MEMBERS

Who are considered derivatives and will they "age out"?

Certain family members can be included as derivatives under the U visa: a spouse and children under 21 of the principal applicant where the principal is over 21 years old. Where the principal

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[25] https://www.uscis.gov/i-192

[26] See *Matter of Sanchez Sosa*, 25 I&N Dec. at 811, BIA stated that "[t]he USCIS has exclusive jurisdiction over U visa petitions and applications for adjustment of status under section 245(m) of the Act[, 8 U.S.C. § 1255(m) (2006)]."

[27] See *L.D.G*, 744 F.3d, 1030-1032 (2014)

[28] See *Matter of Khan*, 26 I&N Dec. 797 (BIA 2016).

is under 21 then derivative family members include, spouse, children, parents and unmarried siblings who are under 18.[29]

The age of the qualifying family member is determined by the date on which the principal properly filed his or her Form I-918. Derivative children will not "age-out" if the principal filed the U application before the child turned 21.[30] Children who file as U principals will also remain "children" for purposes of including family member derivatives until their principal U application is approved.[31] The “fix” to the U age-out problems was backdated by Congress to the date that the U visa became law.[32] It is also important to note that a derivative U Petition can be revoked by USCIS by notice if the derivative’s relationship to the principal has terminated or if the principal’s status has been revoked.[33]

Practice Pointer: If the child derivative (now over 21 years old) is not in the U.S. and has not been issued a U visa and the principal's status will expire, before applying for adjustment of status, the principal should seek an extension and request the extension be applied to the derivative so that the derivative’s ability to enter with the U visa is secured. Once the derivative enters the U.S. with the U visa, if the U visa petition approval notice has not been issued for a full 4 years, he or she should apply for a Form I-539 extension to ensure that the derivative will accrue the requisite 3 years with U nonimmigrant status to be able to adjust his or her status.

Can After Acquired Family Members receive lawful status through a U principal?

After acquired family members will not be able to apply for U visa status as derivatives, as the family relationship did not exist at the time that the principal filed the U application. After acquired family members can still obtain lawful permanent resident status through the U-1 principal based upon the filing of an I-929 Petition, either when the principal adjusts his or her status or at any point after he or she has adjusted status and before naturalization. The U-1 principal must file an I-929 petition for the family member, concurrently with the U-1’s Form I-485 Adjustment Application or subsequently. Once the I-929 is approved, the family member can file for an Immigrant Visa (if abroad) or Adjustment of Status (if in the U.S.). The I-929 requires that the family member demonstrate:

1) The family relationship to the U-1 family member
2) That the after acquired family member has never held U nonimmigrant status

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[29] INA §101(a)(15)(U)(ii); 8 CFR §214.14(a)(10), (f).
[30] INA §214(p)(7)(A)
[31] INA §214(p)(7)(B)
[32] Policy Memo, USCIS, PM-602-0102 *VAWA 2013: Changes to U Nonimmigrant Status and AOS Provisions,* (Apr. 15, 2015); AFM 39.1(f)(4)(i)-(v).
[33] 8 CFR §214.14(h)

3) That the U-1 principal or family member would suffer extreme hardship if the petition was not granted[34]

Practice Pointer: The family member must provide evidence, including a signed statement by the family member, establishing why discretion should be favorably exercised and proof to overcome any adverse factors, including evidence of exceptional and extremely unusual hardship if adverse factors are severe.[35]

CHALLENGES THAT ARISE DURING U VISA ADJUSTMENT OF STATUS

Requirements for a U Adjustment of Status

A U-1 through U-5 is eligible to adjust his or her status to that of a Lawful Permanent Resident if he or she: (1) was lawfully admitted in U status; (2) continues to hold U status at the time of filing the adjustment application; (3) has continuous physical presence for 3 years; (4) is not inadmissible under INA §212(a)(3)(E) [Nazis, genocide, torture, extrajudicial killings]; (5) has not unreasonably refused to provide assistance to Law Enforcement Agency (LEA) in regard to criminal activity that led to U status; and (6) establishes that presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or it is in the public interest.[36]

Derivative family members in lawful U-2, U-3, U-4 or U-5 status may adjust independently of the U-1 principal.[37] A family member in derivative status may also adjust his or her status even if the principal U dies.[38] The family member must demonstrate that she resided in the U.S. at the time of the principal's death and continues to reside in the U.S. The application "shall" be approved unless DHS, in its unreviewable discretion, determines approval would not be in the public interest.

What can make a U Visa holder ineligible for adjustment of status?

A U visa holder is ineligible to adjust his or her status if:

1) U status is revoked.[39]
2) The U holder departed the US for any single period in excess of 90 days or 180 days in the aggregate, unless the agency that signed the I-918 certifies that the absences were "necessary to assist in the criminal investigation or prosecution or were otherwise justified."[40]
3) As a matter of discretion.

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[34] INA §245(m)(3); 8 CFR 245.14(g)
[35] 8 CFR §245.24(h)
[36] INA §245(m); 8CFR §245.24(b)
[37] 8 CFR §245.24(b)(2)
[38] INA §204(*l*)(2)(E)
[39] 8 CFR §245.24(c)
[40] 8 CFR §245.24(a)(1)

The regular grounds of inadmissibility, except INA §212(a)(3)(E), apply to U visa holders applying to adjust their status.[41] However, adjustment of status for U visa holders is discretionary. The applicant has "the burden of showing that discretion should be exercised in his or her favor."[42] USCIS may take into account "all factors, including acts that would otherwise render the applicant inadmissible..." USCIS will generally not exercise its discretion favorably where the applicant has committed or been convicted of a serious violent crime, sexual abuse of a child, multiple drug related crimes, or security or terrorism related concerns.[43]

A U visa applicant for adjustment of status is also ineligible for failure to voluntarily depart when granted by an Immigration Judge, although he or she may argue that failure to depart was not voluntary.[44]

Practice Pointer: If the applicant for adjustment has criminal convictions or arrests that occurred after the U visa was granted, USCIS may request additional documentation with the adjustment application, some of which could be prejudicial to your client. USCIS often requests documents, such as police reports, which are outside the record of proceedings and can be highly prejudicial. USCIS will argue that these documents are needed in order to make an appropriate discretionary decision. However, practitioners should consider whether and when to submit documents that are outside the traditional record of conviction, like police reports. If the documents are highly prejudicial, practitioners might consider arguing that the requested documents are unreliable and prejudicial and not required as a matter of discretion. It might be best to try and withhold such documents to as late a stage as possible without a denial. If the requested documents, however, are not prejudicial and would not adversely affect the client's case, it might be advisable to submit the requested documents, but also argue that they should not be required in the first place as they are outside of the record of conviction.

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[41] 8 CFR §245.24(l)
[42] 8 CFR §245.24(d)(11)
[43] 73 FR at 75549
[44] *Matter of L-S-M-*, Adopted Decision 2016-03 (AAO Feb. 23, 2016).