Department of Homeland Security (DHS) Immigration Policies Released in 2021 and 2022 That Are Important for Immigrant Survivors*

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In 2021, the Federal Government, including the Department of Homeland Security and its agencies USCIS and I.C.E., released new policies regarding enforcement of civil immigration law and the U visa program. These policies are an effort to comply with Executive Order (E.O.) 13993, Revision of Civil Immigration Enforcement Policies and Priorities, 86 Fed. Reg. 7051 (Jan. 20, 2021) and Executive Order 14012, Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans 86 Fed. Reg. 8277 (February 2, 2021), which articulated values and priorities for the administration regarding the enforcement of the civil immigration laws and set new strategies to eliminate sources of fear and other barriers that prevent immigrants from accessing government services available to them.

The following is a list of policies issued by the U.S. Department of Homeland Security that are important to and impact cases of immigrant survivors of crime and abuse that enhance both protections from deportation for survivors and access to immigration relief under the following programs: VAWA self-petitions, U visas, T visas, Special Immigrant Juvenile Status, Battered Spouse Waivers and INA Section 106 Work Authorization for Abused Spouses of A, E(3), G and H visa holders.

Please note all titles in this document are live links to the policies.

Restoring Faith in Our Legal Immigration Systems and Strengthening Integration and Inclusion Efforts for New Americans (Feb. 2, 2021)

President Biden issued an Executive order ("E.O.") on February 2, 2021, articulating the values and priorities for his administration concerning the U.S. Legal Immigration System. The E.O. stated that the Federal Government should develop welcoming strategies that promote immigrants' integration, inclusion, and citizenship. The strategies include ensuring that the immigration processes and other benefits are delivered effectively and efficiently and eliminating sources of fear and other barriers preventing immigrants from accessing government services available to them.

The E.O. covers the different strategies for D.H.S. and other offices in the Federal Government to "welcome and support immigrants, including refugees, and to catalyze State and local integration and inclusion efforts." The efforts to restore trust in the U.S. legal immigration system include, but are not limited to:

- Review existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that may be inconsistent with the values stated on this E.O.
- Identify barriers that impede access to immigration benefits and fair, efficient adjudications of these benefits and make recommendations on how to remove these barriers, as appropriate and consistent with applicable law;
- Immediate Review of Agency Actions on Public Charge Inadmissibility
  - consider and evaluate the current effects of these agency actions and the implications of their continued implementation in light of the policy set forth in section 1 of this order;
  - identify appropriate agency actions, if any, to address concerns about the current public charge policies' effect on the integrity of the Nation's immigration system and public health; and
  - recommend steps that relevant agencies should take to clearly communicate current public charge policies and proposed changes, if any, to reduce fear and confusion among impacted communities.

- Promote Naturalization
  - eliminate barriers in and otherwise improve the existing naturalization process, make the naturalization process more accessible to all eligible individuals

Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021)

This memorandum issued on September 30, 2021, to U.S. Immigration and Customs Enforcement provides guidance for the apprehension and removal of noncitizens. In the Memo, Mayorkas points out that in the United States, there are more than 11 million undocumented or removable noncitizens. "The majority of the more than 11 million undocumented or otherwise removable noncitizens in the United States have been contributing members of our communities across the country for years. The fact an individual is a removable noncitizen will not alone be the basis of an enforcement action against them." Therefore the memo states that it is necessary to exercise discretion and determine priorities for immigration enforcement action. In doing so Secretary Mayorkas stated: "For the first time, our guidelines will, in the pursuit of public safety, require an assessment of the individual and take into account the totality of the facts and circumstances." See the full text of the DHS announcement about these new guidelines.

New civil immigration enforcement priorities for apprehension and removal of noncitizens are:

1. **Threat to national security –** noncitizen who engaged in or is suspected of terrorism or espionage, or terrorism-related or espionage-related activities**,** or who otherwise poses a danger to national security
2. **Public safety –** noncitizen who poses a current threat to public safety, typically because of serious criminal conduct, is a priority for apprehension and removal.
3. **Border security –** people apprehended trying to enter unlawfully in the U.S., or apprehended in the United States after unlawfully entering after November 1, 2020.

More on "Public Safety"
On the threat to public safety, the memo also emphasizes the D.H.S. personnel must evaluate the totality of the facts and circumstances to exercise their judgment. D.H.S. personnel should, to the fullest extent possible, obtain and review the entire criminal and administrative record and other investigative information to learn of the totality of facts of the conduct at issue.

Civil Immigration Enforcement Actions in or near Courthouses (April 27, 2021)

This joint U.S. Immigration and Customs Enforcement (I.C.E.) and U.S. Customs and Border Protection (C.B.P.) memorandum sets forth updated policy regarding civil immigration enforcement in or near federal, state, and local courthouses. Absent certain limited circumstances, this joint memorandum prohibits civil immigration enforcement actions in or near courthouses.

The Limited Circumstances for Courthouse Enforcement
The limited circumstances where civil immigration enforcement action may be taken in or near a courthouse are if

1. it involves a national security threat, or
2. there is an imminent risk of death, violence, or physical harm to any person, or
3. it involves hot pursuit of an individual who poses a threat to public safety, or
4. there is an imminent risk of destruction of evidence material to a criminal case.

Threat to Public Safety

Civil immigration enforcement action also may be taken in or near a courthouse against an individual who poses a threat to public safety if:

1. it is necessary to take the action in or near the courthouse because a safe alternative location for such action does not exist or would be too difficult to achieve the enforcement action at such a location, and
2. the action has been approved in advance by a Field Office Director, Special Agent in Charge, Chief Patrol Agent, or Port Director.

For more Courthouse Enforcement Policies — go here

For more VAWA Confidentiality Policies, Statutes and Regulations — go to the VAWA Confidentiality Webpage here

Replacing the Term "Alien" (May 11, 2021)

Starting May 11, 2021 the USCIS Policy Manual has been updated to replace the term "alien" with "noncitizen" or other appropriate term used to refer to a person who meets the definitions provided in INA 101(a)(3) "any person not a citizen or national of the United States"

John Trasvina Interim Guidance to OPLA Attorneys Regarding Civil Immigration Enforcement and Removal Policies and Priorities (May 27, 2021)

On May 27, 2021,2 ICE Principal Legal Advisor John Trasviña issued a department-wide memorandum ("Trasviña memo") to OPLA attorneys to guide them to appropriately executing the Department's and I.C.E.'s interim enforcement and removal priorities and exercising prosecutorial discretion.[1] OPLA attorneys are expected to exercise their discretion thoughtfully, consistent with I.C.E.'s important national security, border security, and public safety mission.
The Trasviña memo covers the enforcement and removal priority cases, the several prosecutorial discretion of OPLA attorneys, including in proceedings before EOIR, whether to file or cancel a Notice to Appear (NTA). The memo also discusses the authority to exercise prosecutorial discretion on administrative closures of cases by EOIR, dismissal of proceedings, the discretion to take legally viable appeals of decisions and make appropriate legal arguments in response to noncitizen appeals and motions, and the discretion to join motions for relief (oral or written).

[1] The Trasviña memo refers to a memorandum issued on May 27, 2021, from Acting D.H.S. General Counsel Joseph B. Maher, titled Implementing Interim Civil Immigration Enforcement Policies and Priorities ("Maher memo") that is referenced throughout the Trasviña memo. The Maher memo has yet to be publicly released.

Extending Duration of Employment Authorization (June 9, 2021 and February 7, 2022)

This policy extends the duration of work authorization granted certain immigrants and applicants for adjustment of status to lawful permanent residency from 1 to 2 years duration. This includes work authorizations granted to VAWA self-petitioners and abused spouses of A, E(3), G and H visa holders.

ICE Directive 11005.3: Using a Victim-Centered Approach with Noncitizen Crime Victims (August 10, 2021)

This Directive sets forth U.S. Immigration and Customs Enforcement (I.C.E.) policy regarding civil immigration enforcement actions involving immigrant crime victims, including applicants for and beneficiaries of victim-based immigration benefits and Continued Presence.

The Directive acknowledges that a victim-centered approach minimizes the chilling effects that civil immigration enforcement actions may have on the willingness and ability of immigrant crime victims to contact law enforcement, participate in investigations and prosecutions, pursue justice, and seek benefits. In addition, the victim-centered approach encourages victim cooperation with law enforcement, engenders trust in I.C.E. agents and officers, and bolsters faith in the entire criminal justice and civil immigration systems.

The policy

- **Facilitate Access to Justice:** I.C.E. will exercise prosecutorial discretion in appropriate circumstances to facilitate access to justice and victim-based immigration benefits by immigrant crime victims.
- **Applicants for and beneficiaries of victim-based immigration benefits**: I.C.E. will refrain from taking civil immigration enforcement action against known beneficiaries of victim-based immigration benefits and those known to have a pending application for such benefits.
- **Victims of Crimes who are not applicants**: If I.C.E. encounter a victim of crime that is not beneficiary of immigration reliefs, I.C.E. officers must look for evidence to confirm they are crime victims. The fact that a person is a victim of crime is a discretionary factor that must be considered in deciding whether to take civil immigration enforcement action against the noncitizen or exercise discretion, including but not limited to release from detention.
- **Assist Law Enforcement Partners –** during the pendency of any known criminal investigation or prosecution, I.C.E. will not take civil immigration enforcement action against victims and witnesses without approval from Headquarters Responsible Officials**.**

Procedures/Requirements

The I.C.E. memo list a series of procedures and requirements that I.C.E. officers must take in order to exercise a victim-centered approach.

- Identifying applicants for and beneficiaries of victim-based immigration benefits
- Returning A-Files to USCIS
- Adhering to VAWA confidentiality 8 U.S.C. §1367 protections including not relying on perpetrator provided information, respecting the confidentiality of victim's case filings, and bars on immigration enforcement at protected locations
- Deferring to and respecting USCIS adjudications
- Respecting ICE Continued Presence authorization provided to human trafficking victims
- ICE officers must consider any and all evidence that an individual is a crime victim when making detention decisions;
- When a detained victim gains approval of a victim based immigraiton case the victim should be considered for release from detention.
- Implementing a Victim-Centered Approach to civil immigration enforcement
- Seek required approvals from headquarters for civil immigration enforcement actions
- Identifying noncitizen crime victims
- Tracking and reporting civil immigration enforcement actions taken against applicants for and beneficiaries of victim-based immigration benefits to the Office of the Director

- Human trafficking victimization must be considered when making civil immigration enforcement decisions for trafficking victims who engaged in unlawful activities.
- Recognize that some victims of domestic violence who acted in self-defense may have domestic violence charges or convictions. When this occurs ICE officers are to consult with Headquarters before taking any civil immigration enforcement action.

Policy Alert: USCIS Expedite Criteria and Circumstances (June 9, 2021, January 25, 2022 and May 6, 2022)

USCIS issued updated criteria for expediting adjudication of applications and petitions with its most recent update October 1, 2021. This policy can be helpful in cases of immigrant crime victims with pending VAWA self-petitions, U visa or T visa cases when the victim is detained or there is case pending before an immigration judge in which there is a date for a merits hearing set and the victim needs to have their case adjudication expedited, so as to have a decision on that case before the victim has to appear in immigration court for a merits hearing.

Importantly the new expedite criteria explicitly lists safety of the victim due to VAWA confidentiality violations as an emergency or urgent humanitarian basis for an expedite requests. Requests to expedite can be filed by attorneys for the victim including when ICE is also authorized to file expedite requests for victims in removal proceedings and with final orders of removal.

USCIS Policy Manual Chapter 5 – Requests to Expedite Applications or Petitions (October 1, 2021)
How to Make an Expedite Request (June 9, 2021)

New D.H.S. U Visa Bona Fide Policy Provides Earlier Access Deferred Action and Work Authorization to Applicants (June 14, 2021)

On June 14, 2021, The Secretary of Homeland Security, Alejandro Mayorkas, announced a new policy for making bona fide determinations in U visa cases that will result in immigrant victims who are U visa applicants receive much earlier access to work authorization and deferred action, which offers important protections from deportation to immigrant U visa applicant survivors. USCIS has decided to exercise its discretion to conduct bona fide determinations (BFD) and provide Employment Authorization Documents and deferred action to noncitizens with pending, bona fide petitions who meet certain discretionary standards.

These policy changes are consistent with the research findings conducted by NIWAP showing that providing victims a path to economic independence through work authorization fosters greater trust and faith in law enforcement and in the U.S. justice system, which is the primary goal of the U visa program.

More about the research and the D.H.S. Bona Fide U Visa policy — go here

USCIS Policy Guidance T Visa Status for Victims of Severe Forms of Trafficking In Persons USCIS Policy Manual Updates (October 20, 2021)

Updates to the USCIS policy manual that provide guidance on eligibility requirements, evidentiary standards, burdens of proof, admissibility determinations, travel considerations, and confidentiality protections for T visa applicants. Clarifies age-based exemptions from the requirement to comply with reasonable requests from law enforcement. Clarifies how USCIS evaluates involuntary servitude claims, including conditions of servitude induced by domestic violence, as well as victimization that may occur during a voluntary smuggling arrangement.

T-Visa Law Enforcement Resource Guide (October 20, 2021)

The guide, published on Oct. 20, 2021, provides certifying officials with best practices for approaching the T visa certification process, emphasizes that completing the Supplement B is consistent with a victim-centered approach, and clarifies the role and responsibility of certifying agencies in the T visa program. USCIS has sole jurisdiction to adjudicate applications for T visas.

Highlights include:

- The role of Form I-914 Supplement B, Declaration of Law Enforcement Officer for Victim of Trafficking in Persons;
- Best practices for certifying agencies;
- T Visa Quick Reference Guide;
- Responses to frequently asked questions; and
- Additional resources for certifying agencies and officials
- Information on how to report VAWA confidentiality violations

Violence Against Women Act (VAWA) Self-Petition Guidance Added to USCIS Policy Manual (February 10, 2022)

This policy manual chapter implemented many of the provisions of the Violence Against Women Acts of 2000, 2005 and 2013 that govern VAWA self-petitions. This policy manual builds upon guidance issues by INS and USCIS over the years and explicitly addresses many (but not all) of the areas of inconsistency where VAWA self-petitioning statutes supersede the VAWA self-petitioning regulations issued in March of 1996. Examples include:

- No need for VAWA self-petitioners to prove extreme hardship;
- Eligibility of intended spouses to self-petition;
- Divorce or death of the abuser would not in most cases cut off the victims ability to self-petition;
- Divorce does not terminate the stepchild stepparent relationship for purposes of self-petitioning eligibility;
- Adopted abused children may self-petition without having to meet the adoption 2 year residency requirement with the abuser;
- Shared residence with the abuser need not have occurred during the marriage or qualifying relationship;
- VAWA self-petitions may be filed from outside of the U.S.;
- Child self-petitioners can include their own children in their VAWA self-petitions;
- Child self-petitioner abused when they were under age 21 may VAWA self-petitions up to before they turn age 25; and
- Child self-petitioners and children including in their parent's self-petitions who are under age 21 at the time of filing will not age out of the application so long as they remain unmarried.

Additional improvements include:

- Applying VAWA any credible evidence rules to all VAWA self-petitioners and confirming that VAWA self-petitioners cannot be required to submit any particular piece of evidence;
- Includes a list of factors that could contribute to and support a finding of extreme cruelty;
- Same types of evidence may be submitted to demonstrate the parent-child relationship for child self-petitioners and for self-petitioning parents;
- Helpful clarifications regarding step and adoption relationships for purposes of child, son, daughter, and parent self-petitioning eligibility;

- Evidence of separation alone cannot support a finding that a marriage was not bona fide;
- Proof of good faith marriage is required only of a self-petitioning spouse;
- Adjudicators of VAWA self-petitions must make a separate and independent determination about good faith marriage and whether an applicant previously engaged in marriage fraud and cannot rely solely on prior USCIS findings; and
- Confirms that USCIS field officers adjudicating lawful permanent residency applications for approved VAWA self-petitioners may not inquire about abuse or extreme cruelty or attempt to re-adjudicate the self-petition.

Updated USCIS Mission Statement (February 23, 2022)

USCIS upholds America's promise as a nation of welcome and possibility with fairness, integrity, and respect for all we serve.

U-Visa Law Enforcement Resource Guide (February 28, 2022)

This guide provides certifying officials, including law enforcement, with best practices for the U visa certification process, emphasizes that completing the Supplement B is consistent with a victim-centered approach, and clarifies the roles and responsibilities of certifying agencies in the U visa program. Includes a requirement that copies of certifications signed by agencies be kept in a manner that complies with VAWA confidentiality statutes and information on how to report VAWA confidentiality violations.

Highlights of the guide include:

- The U visa law enforcement certification process;
- Best practices for certifying agencies;
- U Visa Quick Reference Guide;
- Outline of the U visa adjudication process;
- Responses to frequently asked questions; and
- Additional resources for certifying agencies and officials, including information for other DHS personnel on U visas.

USCIS to Provide Deferred Action and Work Authorization to Children with Approved Special Immigrant Juvenile Status Cases (March 7, 2022 and May 6, 2022)

USCIS will automatically conduct deferred action determinations for noncitizen children whose SIJS applications are approved when the child cannot immediately apply for lawful permanent residency due to visa availability backlogs. SIJS children will receive deferred action for a 4 year period and based on deferred action the child may apply for employment authorization that will last for the same period of time as the deferred action.

USCIS Issues Final Rule Governing Special Immigrant Juvenile Petitions (March 8, 2022)

U.S. Citizenship and Immigration Services published final rule governing Special Immigrant Juvenile Status cases, filings, adjudications and access to lawful permanent residency for SIJS children. These rules incorporate statutory changes made since issuance of the prior rule and clarify eligibility requirements. Incorporates statutory amendments from The Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4319 (Jan. 25, 1994); The Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998 (CJS 1998 Appropriations Act), Pub. L. 105-119, 111 Stat. 2440 (Nov. 26, 1997); The Violence Against Women and

Department of Justice Reauthorization Act of 2005 (VAWA 2005), Pub. L. 109-162, 119 Stat. 2960 (Jan. 5, 2006); and The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA 2008), Pub. L. 110-457, 112 Stat. 5044 (Dec. 23, 2008). The regulations and the preamble to the regulations published in the federal register clarified many important issues including the following examples:

- Any state court that makes judicial determinations about dependency an/or custody and care of children is considered a juvenile court able to issues SIJS findings;
- Immigrant children with custody orders placing them in the care of an individual can qualify for SIJS and can children declared dependent on the state or place with a state or other agency;
- Courts can determine that reunification is not viable with a parent who abused, abandoned, or neglected the child and this non-viability determination does not require termination of parental rights;
- State courts are to apply state law including but not limited to state law on best interests of the child and state definitions of abuse, abandonment, and neglect when making SIJS findings;
- State law governs the age up to which a state court has jurisdiction to issue orders involving children and juveniles
- If so long as a child was under age 21 when the SIJS application is filed the child can be over age 21 when their application is adjudicated;
- Bars DHS from taking any action that requires an SIJS applicant to contact the parent or any person who battered, abused, neglected, or abandoned the child or any family member of such parent or person.
- SIJS applications are to be decided within 180 days of filing.
- Clarified inadmissibility factors that do not apply to SIJS applicants for lawful permanent residency and what inadmissibility waivers are and are not available.

USCIS Adjudicators Provided Authority to Waive Interviews In Battered Spouse Waiver Cases and for Other Conditional Permanent Residents (April 7, 2022)

In cases of spouses of U.S. citizens who were granted 2 year conditional permanent residency (CPR), USCIS officers have the discretion to grant the request to remove the conditions and grant the immigrant spouse full lawful permanent residency without requiring an interview. All spouses will have been interviewed together with their citizen spouse prior to being granted conditional permanent residency. The updated policy allows adjudicators to grant full lawful permanent residency without an interview when the record contains sufficient evidence, and there is not indication of fraud, misrepresentation, criminal bars, or other factors that may require an interview. The guidance allows officers to grant lawful permanent residency to battered spouse waiver applicants without an interview when "there is sufficient evidence in the record of the CPR's eligibility for the waiver of the joint filling requirement."

Policies revoked

The new D.H.S. Policies have revoked some older policies. The following policies are no longer in force, but they are available for consultation and historical purposes on our website.

Policies issued by the Biden Administration that have been updated and replaced:

(1) The January 20, 2021, Interim Revision to Civil Immigration Enforcement and Removal Policies and Priorities issued by then-Acting Secretary David Pekoske, and

(2) I.C.E. Directive No 11090.1: Interim Guidance: Civil Immigration Enforcement and Removal Priorities issued by Acting I.C.E. Director Tae D. Johnson. (Feb. 18, 2021)

Policies Issued by Prior Administrations That Have Been Rescinded, Revoked or Superseded

(3) I.C.E. Directive: 11005.2: Stay of Removal Requests and Removal Proceedings Involving U Nonimmigrant Status (U Visa) Petitioners (Aug. 2, 2019)

(4) USCIS PM-602-0050.1 Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens (June 28, 2018 and updates October 1, 2018 and November 19, 2018)

(5) Revising Guidance on Naturalization Civic Education Requirement. Revoked 2020 version of the test and replaced it with the 2008 version of the test.

(6) Stopped applying the 2019 Public Charge Rule (August 14, 2019) in adjudications and returned to the 1999 Interim Field Guidance and created a public charge resources website.

(7) Rescinded the July 13, 2018 policy memo "Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator's Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b), PM-602-0163" that resulted in USCIS denying VAWA, SIJS, T and U visa applications of immigrants who could have demonstrated eligibility.

(8) Revised Interview Waiver Guidance for Form I-751, Petition to Remove Conditions on Residence, PM-602-0168, issued November 30, 2018.

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