

To: United States Citizenship and Immigration Services

Date: May 19, 2021

From: Leslye E. Orloff, National Immigrant Women's Advocacy Project, American University, Washington College of Law

Re: Comment in Response to Request for Public Input: Identifying Barriers Across U.S. Citizenship & Immigration Services (USCIS) Benefits and Services; CIS No. 2684-21; DHS Docket No. USCIS-2021-0004; RIN 1615-ZB87

I am writing to strongly support and incorporate by reference into these comments the Joint Comments in Response for Public Input: Identifying Barriers Across USCIS Benefits and Services that were coordinated by Advocates For Immigrant Survivors, ASISTA, Asian Pacific Institute on Gender-Based Violence, Immigrant Center for Women and Children and Tahirih Justice Center that the National Immigrant Women's Advocacy Project American University, Washington College of Law signed on to. The purpose of these comments is to submit social science research findings that support the recommendations made in those comments and to make a few supplemental recommendations that are supported by our research findings.

First, we commend you for seeking comments from the public on how USCIS can reduce administrative burdens and barriers that prevent eligible immigrants from accessing immigration benefits they are eligible to receive. We are writing to highlight the particular needs for reforms in policies, regulations and USCIS practices that will assist immigrant survivors of domestic violence, sexual assault, stalking, child abuse, human trafficking and other U visa listed criminal activities from in accessing immigration protections under the VAWA self-petition and U visa programs.

NIWAP (National Immigrant Women's Advocacy Project) conducted a national survey in 2016 and 2019 collecting data from 169 agencies in 42 states serving immigrant survivors who applied for immigration relief as victims of crime and abuse. The victim advocates, attorneys and state government agency staff who participated in this survey reported on 11,171 clients who had applied for immigration relief as VAWA self-petitioners (26%) U visa applicants (71%) and VAWA cancellation of removal of suspension of deportation (3%). Eighty percent (80%) of clients were victims of domestic violence, child abuse, sexual assault, stalking or human trafficking. A key goal of this research was to learn how survivor applicants, their children, the justice system, and communities from the VAWA and U visa programs and when as their immigrant case proceeds do applicants begin to receive the tangible benefits and protections that Congress envisioned for the VAWA and U visa programs. This study documents the resilience and success of VAWA and U visa applicants, documents how when the VAWA and U visa victims receive deferred action and work authorization victim's lives are transformed with improved functioning, stability, justice system participation, and many become actively involved in helping other victims in their communities seek help. The survey is incorporated into these comments by reference and is titled "Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Victims and their Children After Work-Authorization and Legal Immigration Status." The survey is being submitted as part of these comments in three appendices:

- Appendix A: Executive Summary with recommendations¹
- Appendix B: Abstract, Summary, Recommendations²
- Appendix C: Full Report³

The findings of this research provide evidence-based support for a number of important policy changes that would contribute substantially to accomplishing the goals of the VAWA and U visa statutes and immigration relief programs. The following recommendations are steps that United States Citizenship and Immigration Services should take that will improve access to the protections for immigrant survivors offered by the VAWA self-petitioning and U visa programs. The proposed policy improvements will also cut off domestic violence, sexual assault, child abuse, stalking and human trafficking perpetrators from coercively controlling and retaliating against victims as a way to shield themselves from successful criminal investigations and prosecutions.

The urgent policy reforms needed include:

1. Speed Up Access to Deferred Action and Work Authorization for U Visa Applicants: Provide deferred action and work authorization to U visa applicants who have established a bona fide or prima facie case for eligibility as early as possible. These changes need to be implemented in a manner that ensures the shortened time lines substantially reduce waits for deferred action and work authorization for all cases currently pending adjudication and are designed so that cases filed in the future will receive deferred action and work authorization as close to 6 months post filing as possible.
2. Reform Adjudication Processes to Ensure That VAWA All Self-Petitioners Receive Early Access Deferred Action and Work Authorization: Provide deferred action to VAWA self-petitioners issued along with prima facie determinations as this will both provide immediate protection from deportation they need and will facilitate access to drivers' licenses and state funded benefits particularly for abused spouses and children of lawful permanent residents. As will be discussed in more detail below. The delays in access to work authorization and deferred for VAWA self-petitions has particularly severe implications for access to public and assisted housing and driver's licenses for VAWA self-petitioners.
3. Reform Immigration Case Processing Procedures That Impeded VAWA Self-Petitioner's Access to Housing and Drivers' Licenses:

¹ Leslye E. Orloff, Haley Iesha Magwood, Yasmin Campos-Mendez, and Giselle A. Hass, Executive Summary, *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Victims and their Children After Work-Authorization and Legal Immigration Status* (April 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/exec-summary-transforming-lives> Appendix A Attached.

² Leslye E. Orloff, Haley Iesha Magwood, Yasmin Campos-Mendez, and Giselle A. Hass, *Abstract, Conclusions, Recommendations – Transforming Lives: How the VAWA Self-Petition and the U Visa Change the Lives of Victims and Their Children After Work Authorization and Legal Immigration Status* (April 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-abstract-conclusions-recommendations>. Appendix B Attached.

³ Leslye E. Orloff, Haley Iesha Magwood, Yasmin Campos-Mendez, and Giselle A. Hass, *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Victims and their Children After Work-Authorization and Legal Immigration Status* (April 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-full-report>. Appendix C Attached.

a. Public and Assisted Housing: In 1996 Congress made VAWA self-petitioners eligible for Section 214 public and assisted housing. In 2016 HUD clarified that VAWA self-petitioners were to be eligible for Section 214 public and assisted housing beginning at on the date the victim filed their VAWA self-petition.⁴ DHS and HUD collaborated on development of method that Public Housing Authorities could use to verify whether an immigrant seeking public and assisted housing was a VAWA self petitioner.⁵ These policies allow VAWA self-petitioners who are living in housing units with vouchers and those who are living in public housing with their abusers to file their VAWA self-petitions, seek public and assisted housing benefits, remove the perpetrator from the housing unit and remain in the housing unit receiving the full subsidy the VAWA self-petitioner and her children are entitled to without being subject to proration. This provided housing security allowing VAWA self-petitioners to remain in the subsidized housing unit with their children. However, all persons residing in HUD housing are given a short period of time that is with extensions usually no longer than 6 months to provide HUD a social security number for each person receiving housing subsidies. The point in the immigration case process where VAWA self-petitioners can apply for social security numbers is when they are granted work authorization. For VAWA self-petitioning spouses and children of lawful permanent residents USCIS only grants work authorization once the VAWA self-petition has been adjudicated. The delays in adjudication of VAWA self-petitions combined with the fact that USCIS currently does not grant deferred action and work authorization when it makes prima facie determinations leaves VAWA self-petitioners who are spouses and children of lawful permanent residents in a the precarious position of losing housing subsidies that can lead to homelessness. While there is technically a possibility that VAWA self-petitioners may be able to convince their local Public Housing Authority to give them a letter that allows them to seek a non-work social security number from the Social Security Administration neither HUD or SSA staff have received any training on the issue and it is a process that few self-petitioners are able to effectively succeed in navigating. This problem would be solved if USCIS assessed VAWA self-petitions for deferred action and granted work authorization at the same time as it reviews the case for a prima facie determination. Providing early access to work authorization to VAWA self-petitioners at the prima facie determination stage will provide much needed housing security to VAWA self-petitioners and their children.

b. Drivers' Licenses: In 43 states immigrants receive drivers' licenses after they are granted work authorization in an addition 3 states drivers' licenses are granted to immigrants who have been granted deferred action. Without work authorization and/or deferred action VAWA self-petitioners and U visa victims are not eligible to receive either a drivers' license or a federally recognized ID.⁶ Only 12 states grant immigrants the ability to obtain a state recognized drivers' license when they do not qualify under

⁴ Eligibility of VAWA Self-Petitioners for Financial Assistance Under Section 214 of the Housing and Community Development Act of 1980 (December 15, 2016) <https://niwaplibrary.wcl.american.edu/pubs/eligibility-of-vawa-self-petitioners-2016-12-15>

⁵ HUD – VAWA Self-Petitioner Verification Procedures (January 19, 2017) <https://niwaplibrary.wcl.american.edu/pubs/hud-vawa-self-petitioner-verification-procedures>.

⁶ Leslye E. Orloff, State-Funded Public Benefits Comparison Chart (April 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/state-benefits-comparison-chart>.

Real ID laws for a federal recognized drivers' license.⁷ Lack of access to drivers' licenses poses significant safety concerns for immigrant survivors of domestic violence, sexual assault, child abuse, stalking and human trafficking increasing their vulnerability to abuse, and limiting their ability to flee abusive homes, traffickers and abusive employers. This lack of access to drivers' licenses in most states explains why traffic stops are the most frequent trigger to immigration enforcement against immigrant survivors other than perpetrators turning victims in for immigration enforcement.⁸ USCIS can remedy this problem by providing access to work authorization and deferred action for U visa victims at an earlier stage of the case by making bona fide determinations. USCIS can also solve this problem for VAWA self-petitioners by making assessments of deferred action and granted work authorization at the same time USCIS issues prima facie determinations.

4. VAWA Unit Staffing and Training: Increase staffing for and reinstate trainings for VAWA Unit adjudicators at the Vermont and Nebraska Service centers that are presented collaboratively by experts at DHS and subject matter experts from outside the agency similar to the all VAWA Unit trainings conducted in 2015, 2009 and 2005 and consider involving a judicial trainer with expertise on VAWA and U visas. It is important that USCIS policies also require that the VAWA Unit maintain its staffing at levels of at least 85% of capacity at all times. One of the significant problems with VAWA Unit adjudications has been that historically USCIS has taken trained adjudicators from the VAWA Unit and assigned them to work on other case types that at any given time may be deemed a higher priority than VAWA Unit adjudications. This practice should end and DHS and USCIS should consider creating a line-item in the DHS budget that is sufficient to maintain the VAWA Unit at levels that will allow for reduction in back-logs and then maintaining the reasonable and consistent adjudication timeframes in the future.
5. Remedy for VAWA Confidentiality Violations: Should include expediting adjudication of pending VAWA self-petitions, U visa, or T visa applications for the victim who suffered the VAWA confidentiality violation. The VAWA Unit expedite criteria should be amended to explicitly authorize expediting of a VAWA or U visa case as a remedy for VAWA confidentiality violations. USCIS and DHS should work with ICE to ensure release from detention and cancellation of notices to appear in cases of VAWA self-petition, VAWA cancellation, U visa and T visa applicants who have been victims of VAWA confidentiality violations.
6. Train ICE Trial Attorneys: Conduct training for ICE trial attorneys involving USCIS and subject matter experts from outside of the agency on VAWA confidentiality and the VAWA and U visa programs similar to the training held for all OPLA staff and managers in 2007.
7. Cancel All NTA's Issued to Applicants Whose VAWA, T or U Visa Cases Were Denied: Under the Notice to Appear Policy adopted by the prior administration, in cases of victims whose VAWA, T, or U visa cases were denied USCIS issued Notices to Appear against victims. These

⁷ Id.

⁸ Rafaela Rodrigues et al., Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey, NIWAP 114 (May 3, 2018), <https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report> (Among immigrant victims who were subject to immigration enforcement traffic stops triggered the enforcement action for 11% of VAWA self-petitioners, 39% of U visa victims, 10% of T visa victims and 89% of immigrant victims who had obtained civil protection orders).

notices were issued in many cases without regard to the reason for the denial. In at least one case USCIS had evidence in the case file demonstrating that they had an incorrect address for the U visa applicants attorney and continued sending notices to the address they knew was wrong, but never sent any notice to the victim whose correct safe address was listed on the self-petition. When there was no response to the RFE, USCIS denied the case on the merits and placed the victims in removal proceedings. The immigration court was able to determine a correct address for the attorney and used the correct address for the applicant to notify them about the removal proceedings. This case illustrates the dangers for immigrant victims of the NTA policy. This case also illustrates the need to confirm that it is VAWA Unit policy that all notices issued by the VAWA Unit must be mailed to both any attorney of record and the safe address of the victim that is listed on the petition. Further, cancellation of the NTA policy is insufficient. All NTA's issued under the policy need to be reviewed and cancelled.⁹ USCIS, DHS, ICE and CBP should all fully implement the 2011 Victim Witness Prosecutorial Discretion Memo and DHS should prohibit arrest, detention, deportation, issuance of notices to appear and any immigration enforcement against victims with pending or approved VAWA, U and T visa cases.¹⁰

- Rescind the 2019 USCIS Law Enforcement Resource Guide: DHS should immediately rescind the “*U Visa Law Enforcement Resource Guide*” issued by USCIS in August of 2019 that purports to cancel and supersede the resource guide issued by the Department of Homeland Security in November of 2015 “*U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies.*” The 2015 DHS Guide’s continuing effect should be confirmed and the USCIS 2019 Guide should be rescinded. The 2019 guide has contains information that is inconsistent with the U visa statute, regulations, and legislative history. For law enforcement agencies the 2019 guide discourages certification, fails to address helpfulness in detection, conviction or sentencing, encourages application of statutes of limitations that are not imposed by the U visa statute, and has resulted in fewer law enforcement agencies willing to certify U visas or certifying fewer numbers of cases.¹¹
- 8. Expand U Visa Certification to Authorize Subject Matter Experts: The U visa regulations should be amended to either eliminate the supervisor requirement imposed by the U visa regulations altogether or expand the authority of heads of state and local law enforcement, prosecutors, child and adult protective services agencies to designate subject matter experts on their staff in addition to supervisors to sign U visa certifications.¹²

⁹ All NTAs should be cancelled except in cases of applicants who would not be either VAWA or U visa eligible because they participated in Nazi persecution, genocide, acts of torture or extrajudicial killings.

¹⁰ This protection would apply to all cases unless the case is denied on its merits and all opportunities for appeal have been exhausted. Exception for applicants who participated in Nazi persecution, genocide, acts of torture or extrajudicial killings.

¹¹ For a full analysis of the 2019 USCIS Guide see, Leslye E. Orloff, Analysis of USCIS 2019 U Visa Law Enforcement Resource Guide – Memo to DHS From NIWAP (September 29, 2019) <https://niwaplibrary.wcl.american.edu/pubs/niwap-letter-to-dhs-2019-u-visa-resource-guide> and USCIS U Visa Resource Guide 2019 – Annotated by NIWAP (August 10, 2019) <https://niwaplibrary.wcl.american.edu/pubs/annotated-uscis-u-visa-resource-guide>

¹² Chief Pete Helein, Chief Scott Livingstone, Chief Gregory Suhr, and Chief Michael Masterson, Final Rule on U Visa Certifications and Elimination of the Supervisor Requirement (January 22, 2014) https://niwaplibrary.wcl.american.edu/pubs/final_police-chiefs-letter_supervisor; Krisztina E. Szabo, et.al., Expanding Designation Authority to Include “Subject-Matter Experts” (February 14, 2014) <https://niwaplibrary.wcl.american.edu/pubs/expanding-the-designation-authority-subject-matter-experts>.

9. Move Battered Spouse Waiver Adjudications to the VAWA Unit: In 2017 NIWAP published research demonstrating the significant problems that exist with battered spouse waiver adjudications being conducted by USCIS by staff in service centers and USCIS offices across the country who have received little or no training on the dynamics of domestic violence and VAWA confidentiality requirements¹³. NIWAP's report found inconsistencies in the manner in which battered spouse waiver cases are decided and the time it takes for adjudications varies widely across the country. Battered spouse waiver applicants are immigrants married to a U.S citizen or lawful permanent residents whose cases are similar to all other VAWA self-petitions. Battered spouse waiver cases should be adjudicated by the same specialized team of adjudicators that decide VAWA self-petitions, T visas and U visas. Congress in 2005 stated that in legislative history that it expected battered spouse waiver cases to be adjudicated by the VAWA Unit.¹⁴
10. End All Fees on VAWA Unit Cases: Fees and the fee waivers process pose significant barriers to protection for survivors filing VAWA self-petition and U visa cases and any other case type entitled to receive VAWA confidentiality protection. In recent years it has been getting harder to secure fee waivers with significant lack of consistency in fee waiver adjudications. This poses a significant barrier to safety for immigrant survivors. Victims' cases are not entered into the VAWA confidentiality notification system that ICE and CBP can check to see if the person whom they are considering an enforcement action against is an immigrant victim. Any delay caused by fee waiver adjudications and denials gives perpetrators more time in which they can try to trick DHS enforcement officials or USCIS adjudicators in family based visa petitions into using perpetrator provided information against victims. Perpetrators of VAWA self-petitioners and U visa victims are actively involved in trying to convince offering "tips" that lead DHS enforcement officials initiate enforcement actions, arrest, and/or detain immigrant crime victims.¹⁵ All fees on all cases of immigrant survivors who are eligible for VAWA confidentiality protection should be eliminated. This includes fees on any form type a survivor files, as well as on work authorization, lawful permanent residency applications, and waiver applications.

¹³ Kavel Joseph, et. al., Moving Battered Spouse Waiver Adjudications to the VAWA Unit: A Call for Consistency and Safety National Survey Findings Highlights (February 6, 2017) <https://niwaplibrary.wcl.american.edu/pubs/battered-spouse-waiver-report-2-6-2017>.

¹⁴ HR 3402 House Judiciary Report: VAWA Legislative History (September 22, 2005) (Section 911 p.116) <https://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005>.

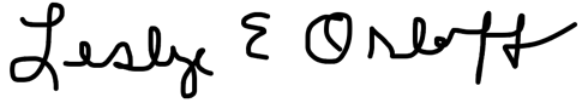
¹⁵ Rafaela Rodrigues et al., Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey, NIWAP 114 (May 3, 2018), <https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report> (Victims experienced perpetrator-initiated enforcement actions at rates of 25% for U visa victims and 38% for VAWA self-petitioners);

Krisztina E. Szabo et al., Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants, NIWAP 25-26 (Feb. 12, 2014), https://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12. (Perpetrators initiated immigration enforcement actions against 27% of U visa victims and 27% of VAWA self-petitioners);

See also, Leslye E. Orloff, J.D., Haley Iesha Magwood, J.D.; Yasmin Campos-Mendez, M.S.W, and Giselle A. Hass, Psy.D., Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Victims and their Children After Work-Authorization and Legal Immigration Status 132-134 (April 12, 2021) <https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-full-report>

NIWAP appreciates the opportunity to submit these comments and would welcome the opportunity to provide additional information and documentation in support of each of the recommendations we include here. For further information please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink that reads "Leslye E Orloff". The signature is written in a cursive style with a large initial 'L' and a stylized 'E'.

Leslye E. Orloff
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American University, Washington College of Law