

Office of the Principal Legal Advisor

U.S. Department of Homeland Security
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Washington, DC 20024



U.S. Immigration
and Customs
Enforcement

SEP 25 2009

MEMORANDUM FOR: OPLA Attorneys

FROM: Peter S. Vincent *PCV*
Principal Legal Advisor

SUBJECT: **Guidance Regarding U Nonimmigrant Status (U visa) Applicants in Removal Proceedings or with Final Orders of Deportation or Removal**

Purpose

This memorandum provides field guidance to ensure compliance with the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA) regarding aliens with pending U visa petitions who are either (1) subject to a final administrative order of deportation or removal and request a stay of removal or (2) in removal proceedings.

Background

The Office of Detention and Removal Operations (DRO) has issued field guidance for handling U visa applicants who are under a final order of removal. For aliens with final orders of removal, DRO is to contact its local Office of Chief Counsel (OCC) in order to request a *prima facie* determination from the U.S. Citizenship and Immigration Services (USCIS) Vermont Service Center (VSC). DRO is also to contact its local OCC in cases of detained aliens in removal proceedings with pending petitions.

Final Order Aliens who Request a Stay of Deportation or Removal

The Secretary of Homeland Security and her delegates have discretion to grant a stay of an administrative final order of removal under section 241(c)(2) of the Immigration and Nationality Act (INA) to an alien with a pending petition for a U visa if the alien establishes *prima facie* eligibility for the benefit. See INA § 237(d). A determination that a petition is *prima facie* eligible does not prevent a subsequent denial of the pending U nonimmigrant status petition. The stay of removal may remain in effect until (1) USCIS approves the petition for a U visa or (2) USCIS denies the U visa petition after the alien has exhausted all administrative appeals.

SUBJECT: Administrative Stay of Removal for U Nonimmigrant Status (U visa) Applicants

The FOD should favorably view an alien's request for a stay of removal if USCIS has determined that the alien has established *prima facie* eligibility for a U visa. When deciding the stay request, the FOD should also consider favorably any humanitarian factors related to the alien or the alien's close relatives who rely on the alien for support. *Cf.* 8 C.F.R. § 212.5.

A stay is not appropriate on the basis of the U visa in the following situations: (1) USCIS has determined that the alien is not *prima facie* eligible for a U visa; (2) USCIS has denied the alien's petition for a U visa on the merits; or (3) serious adverse factors weigh against a stay of removal. Serious adverse factors include the following: (1) national security concerns; (2) evidence that the alien is a human rights violator; (3) evidence that the alien has engaged in significant immigration fraud; (4) evidence that the alien has a significant criminal history; and (5) any significant public safety concerns.

Upon receiving a stay request from an alien with a pending U visa petition, the local DRO office must contact its local OCC to request a *prima facie* determination from USCIS's Vermont Service Center (VSC). DRO should allow USCIS a minimum of five (5) business days to make a *prima facie* determination. During this time, the FOD should not deport or remove the alien, although DRO may continue to secure the necessary documents to effect the alien's removal in the event USCIS finds that the alien is not *prima facie* eligible for a U visa or denies the petition on the merits. The VSC will e-mail the respective Field Office DRO stay mailbox and the local OCC point of contact with the results of the *prima facie* review or a copy of the decision notice.

If USCIS finds that the alien has established *prima facie* eligibility, the FOD, working in conjunction with the local OCC, will adjudicate the stay request. The FOD should view a stay request favorably, unless serious adverse factors exist, as outlined above. If the FOD finds that serious adverse factors exist and is inclined to deny the stay request despite the USCIS *prima facie* eligibility finding, the FOD must provide a summary of the case to DROHQ for further review.

Aliens in Removal Proceedings

If an alien in removal proceedings states that he or she has filed a U visa petition with USCIS, and provides proof of such filing, the OCC shall request a continuance to allow USCIS to make a *prima facie* determination. Once USCIS has determined that the alien has made a *prima facie* case, the OCC should consider administratively closing the case or seek to terminate proceedings pending final adjudication of the petition.

If USCIS grants the petition while the alien is still in proceedings and relief in the form of adjustment of status appears clearly approvable, the OCC, exercising its prosecutorial discretion, should favorably consider moving to terminate proceedings. If USCIS grants the petition after the alien receives a final order of removal, the OCC, exercising its prosecutorial discretion, should favorably consider a joint motion to reopen and terminate proceedings with either the immigration court or the Board of Immigration Appeals, whichever has jurisdiction.

This document provides only internal Immigration and Customs Enforcement guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful enforcement or litigative prerogatives of DHS or ICE.