NATIONAL IMMIGRANT JUSTICE CENTER
A HEARTLAND ALLIANCE PROGRAM

PRACTICE ADVISORY[1]
THE U VISA INADMISSIBILITY WAIVER AFTER *L.D.G. v. HOLDER*

By the National Immigrant Justice Center
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INTRODUCTION

Until recently, U visa applicants in removal proceedings who were subject to one or more grounds of inadmissibility relied on U.S. Citizenship and Immigration Services (USCIS) alone to determine whether those inadmissibility grounds would be waived. When USCIS denied a waiver application, the U visa applicant had little recourse. This scheme changed significantly in the Seventh Circuit with the issuance of *L.D.G. v. Holder* on March 12, 2014.[2] In *L.D.G.*, the Court of Appeals for the Seventh Circuit held that the Attorney General and her delegates – immigration judges (IJs) and the Board of Immigration Appeals (BIA) – have concurrent jurisdiction over inadmissibility waivers sought in conjunction with U visa applications under INA § 212(d)(3)(A).[3] This practice advisory provides guidance to practitioners representing U visa applicants in removal proceedings who may request IJ or BIA adjudication of their waivers of admissibility. It sets forth strategic considerations when deciding whether to request IJ/BIA waiver adjudication and offers procedural best practices to most effectively permit noncitizen crime victims in removal proceedings to access U visa protections.

I. U VISA INADMISSIBILITY WAIVER

The U visa is a nonimmigrant visa created by Congress in 2000 to protect non-citizen victims of serious crimes who have assisted in the investigation and/or prosecution of certain crimes.[4] If a U visa applicant is inadmissible to the United States under INA § 212(a), then he or she must apply for and receive a waiver of all applicable grounds of inadmissibility before the U visa will be approved by USCIS, the office within the Department of Homeland Security (DHS) tasked with adjudication of U visas. Most, but not all, inadmissibility grounds listed under INA § 212(a) may be waived in conjunction with an application for a U visa.[5] Any grounds of

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[2] *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014).

[3] *L.D.G*, 744 F.3d at 1030.

[4] Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. Law. No. 106-386, § 1513(a)(2).

[5] *See* INA § 212(d)(14) (noting that the Secretary of Homeland Security may waive all grounds listed under INA § 212(a), with the exception of INA § 212(a)(3)(E) (national security and terrorism-related grounds); *see also Matter of Sanchez Sosa*, 25 I&N Dec. 807, 814 (BIA 2012).

inadmissibility waived through application of a U visa waiver will also be waived for purposes of adjustment of status if the U visa applicant later decides to apply for lawful permanent residence.[6] For a more comprehensive overview of U visas, please consult NIJC's Pro Bono Attorney Manual on Immigration Relief for Crime Victims: U Visas.

Once approved, the U visa allows non-citizen crime victims and certain qualifying family members to live and work in the United States for up to four years, with extensions available in some cases.[7] U visa recipients become eligible to adjust status and apply for lawful permanent residence (LPR) after three years in U nonimmigrant status.[8] Typically, after five years as a lawful permanent resident, LPRs are eligible to apply for U.S. citizenship.[9]

II. THE *L.D.G. V. HOLDER* DECISION[10]

The Seventh Circuit's decision in *L.D.G.* changed the landscape of U visa waiver adjudication by recognizing that the immigration courts and the BIA have jurisdiction to adjudicate waivers of inadmissibility tied to applications for a U visa. Before the decision, U visa applicants in removal proceedings filed their U visa cases – including applications for waivers – for adjudication entirely before USCIS. The immigration court served as a passive forum, where U visa applicants lobbied for continuances while awaiting USCIS adjudications. In the wake of *L.D.G.*, U visa applicants can ask IJs and the BIA to decide their U visa waiver requests and have the option of strategically determining where and when to seek waiver adjudication.

A. Factual Background

L.D.G and her husband entered the United States without inspection in about 1987 and have four U.S. citizen children. In 2006, a group of armed men entered L.D.G.'s family-owned restaurant and kidnapped her and her family. The assailants bound and blindfolded L.D.G. and her family, sexually assaulted L.D.G.'s daughter, and severely beat her husband.

L.D.G. was subsequently arrested and convicted of possession of a controlled substance with intent to distribute. DHS initiated removal proceedings. L.D.G. applied to USCIS for a U visa and sought a waiver of inadmissibility for her unlawful entry and criminal conviction from USCIS. USCIS denied L.D.G.'s application for a waiver of inadmissibility and, on that basis alone, denied L.D.G's U visa application. In removal proceedings, L.D.G. did not contest removability, but argued that the IJ had jurisdiction to grant a waiver pursuant to INA § 212(d)(3)(A), to allow her to obtain U visa status. The IJ found that he lacked jurisdiction to do so and ordered L.D.G. removed. L.D.G. raised the argument again before the BIA, but the BIA

[6] 8 C.F.R. § 245.24(b)(11) ("Although U adjustment applicants are not required to establish that they are admissible, USCIS may take into account all factors, including acts that would otherwise render the applicant inadmissible, in making its discretionary decision on the application.")
[7] INA § 214(p)(6).
[8] INA § 245(m).
[9] INA § 316.
[10] L.D.G. was represented at the Court of Appeals for the Seventh Circuit by pro bono counsel from McDermott Will & Emery and NIJC.

dismissed her appeal. L.D.G. then petitioned for review by the Court of Appeals for the Seventh Circuit

B. Holdings and Key Rulings

The question in *L.D.G.* was whether the IJ had authority to issue a waiver to a U visa applicant, but this question encompasses a logically prior question: i.e., on which statutory basis or bases may a U visa waiver be granted? USCIS regulations permit a U visa applicant to seek a waiver under either INA § 212(d)(3)(A) – which applies to nonimmigrant visa applications generally – or INA § 212(d)(14), which applies only to U visa applicants. The two provisions apply slightly different standards, but more importantly, differ textually and historically.[11] Section 212(d)(3)(A) authorizes the "Attorney General" to grant a waiver. [12] Section 212(d)(14), by contrast, only authorizes a waiver to be granted by the Secretary for the Department of Homeland Security.[13]

The government's briefing implicitly suggested (contrary to its regulations) that section 212(d)(3)(A) is not applicable in the U visa context. The Seventh Circuit rejected this argument, finding section 212(d)(3)(A) available for U visa applicants.[14]

The next question was whether INA § 212(d)(3)(A) authorized IJs – as delegates of the Attorney General – to consider waivers of inadmissibility filed by individuals eligible for a U visa.[15] Rejecting the government's interpretation that the statute granted exclusive jurisdiction to USCIS, the Seventh Circuit held that the text of INA § 212(d)(3)(A) grants the Attorney General and her delegates "authority to waive the inadmissibility of 'an alien' applying for a temporary nonimmigrant visa, subject only to explicit exceptions that do not apply [to L.D.G.'s case]."[16] The court therefore found that IJs and the BIA have jurisdiction to waive the inadmissibility of U visa applicants pursuant to INA § 212(d)(3)(A).[17]

Under *L.D.G.*, IJs and USCIS have concurrent jurisdiction over U visa waivers.[18] This creates dual tracks for waiver determinations for U visa applicants in removal proceedings: a U visa applicant may seek a (d)(3)(A) waiver before the immigration court and/or a (d)(3)(A) or (d)(14)

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[11] *L.D.G*, 744 F.3d at 1025-26.
[12] *Id*.
[13] *Id*. The codified version of INA § 212(a)(14) refers to the "Attorney General's discretion," but this reference was not in the actual statute passed by Congress and was likely "a codifier's error." *Id.* at 1025. "Legislation amending the statute in 2006 replaced 'Attorney General' with 'Secretary of Homeland Security' everywhere in this section, and so the persistence of a reference to Attorney General is likely an inadvertent holdover from the original version of the U visa statute." *Id*. (citing Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006)).
[14] *L.D.G*, 744 F.3d at 1030-31.
[15] *Id.* at 1026.
[16] *Id*. at 1030. These exceptions are noted in the text of INA §212(d)(3)(A) and are discussed in detail in Section III.
[17] *Id*. This interpretation of INA § 212(d)(3)(A) does not render INA §212(d)(14) redundant because the DHS' power under INA § 212(d)(14) is more expansive than that of the Attorney General under (d)(3)(A). *Id.* at 1031-32. There are two main differences between the INA § 212(d) U visa inadmissibility waivers. First, a larger subset of inadmissibility grounds may be waived under INA § 212(d)(14) than INA § 212(d)(3)(A). Second, different legal standards apply under each waiver track. USCIS determines whether it is in the "national or public interest" to grant the waiver under (d)(14), while to receive the (d)(3)(A) waiver, the three factors outlined in *Matter of Hranka* apply. (*See generally*, Section III).
[18] *Id*. at 1031-32.

waiver from USCIS.[19] Whether to seek one or the other – or both – is a strategic decision that rests with an applicant seeking a U visa while in removal proceedings.

The Seventh Circuit found (d)(3)(A) waivers available to noncitizens in removal proceedings even if they have not yet received a final decision on their waiver application from USCIS.[20] The court reasoned that, "if the IJ grants a waiver of inadmissibility, the noncitizen can directly seek the relevant relief (such as a nonimmigrant visa) from the appropriate agency without going through whatever waiver process the agency affords."[21]

In broad terms, under *L.D.G.*, a U visa applicant who requires a waiver of inadmissibility can now apply to both USCIS and an IJ. He or she may obtain an INA § 212(d)(14) or INA § 212(d)(3)(A) waiver from USCIS or an INA § 212(d)(3)(A) waiver from an IJ.

III. DECISION IMPLICATIONS FOR U VISA APPLICANTS IN REMOVAL PROCEEDINGS

This section presents an analysis of the broader implications of *L.D.G.* and sets forth strategic considerations when deciding whether to request IJ/BIA waiver adjudication.

A. The Two U Visa Waivers

As the regulations state, and as *L.D.G.* held, there are two waivers available for U visa applicants.[22] These are INA § 212(d)(3)(A), the general nonimmigrant waiver provision, and INA § 212(d)(14), a provision specific to U visa applicants.

Under INA § 212(d)(3)(A), the adjudicator may waive any inadmissibility grounds except for some relatively rare inadmissibility grounds pertaining to sabotage, espionage, genocide, and participation in Nazi persecution.[23] The INA does not specify a standard for discretionary waivers under § 212(d)(3)(A), but in *Matter of Hranka*, the Board analyzed this provision and created a balancing test:

> [T]here is no requirement that the applicant's reasons for wishing to enter the United States be "compelling." In deciding whether or not to grant an application under section 212(d)(3)(B), there are essentially three factors which we weigh together. The first is the risk of harm to society if the applicant is admitted. The second is the seriousness of the applicant's prior immigration law, or criminal law, violations, if any. The third factor is the nature of the applicant's reasons for wishing to enter the United States.[24]

[19] *Id*. at 1031.
[20] *Id*. at 1031-32.
[21] *Id*. at 1032.
[22] 8 C.F.R. §§ 212.17(a), (b).
[23] To be precise, a 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).
[24] *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978).

The waiver at INA § 212(d)(14) has slightly different eligibility bars, and employs a different standard. The INA § 212(d)(14) waiver is only barred for people who were involved in Nazi persecution, genocide, torture, or extrajudicial killing.[25]

In addition, the statute sets forth a specific standard for the INA § 212(d)(14) waiver: it permits a waiver "if the Secretary of Homeland Security considers it to be in the public or national interest." These are standards which mirror other inadmissibility sections.[26] There is agency case law interpreting these standards. For instance, in the legalization context, the Board defined "public interest" as "something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected."[27] The national interest waiver analysis of *In re New York State Dept. of Transportation*[28] – an employment-visa case – turned on three factors: (a) the "substantial intrinsic merit" of the noncitizen's field of work; (b) whether "the proposed benefit will be national in scope"; and (c) whether "the national interest would be adversely affected" by denial of the waiver.

B. Implications of Joint Jurisdiction

Having held that INA § 212(d)(3)(A) grants the Attorney General authority over waivers of inadmissibility filed by nonimmigrants,[29] the next question was how that authority intersects with the authority of USCIS. The Court in *L.D.G.* found that a U visa applicant may seek a waiver under INA § 212(d)(3)(A) before the Attorney General and her delegates, namely the IJ and BIA.[30]

The *L.D.G* Court did not dictate how USCIS and the immigration courts should coordinate when an applicant is seeking waiver adjudication before an IJ. By regulation, the Form I-918, Petition for U Nonimmigrant Status, must be filed directly with USCIS, which has sole jurisdiction to adjudicate the petition.[31] A U visa applicant seeking an inadmissibility waiver under either INA

[25] Thus, a slightly larger subset of inadmissibility grounds maybe waived under INA § 212(d)(14) than INA § 212(d)(3)(A). Under INA § 212(d)(14), USCIS may waive any inadmissibility ground except those articulated in INA § 212(a)(3)(E), including Nazi persecution, genocide, torture and extrajudicial killing.

[26] *See* INA § 203(b)(2) (national interest); INA § 212(d)(13)(B) (same); INA § 212(t) (national or public interest); INA § 212(a)(3)(D)(iv) (public interest); INA § 212(d)(5)(B) (same); INA § 212(d)(11) (same); INA § 212(e)(iii) (same); INA § 237(a)(1)(E)(iii) (same).

[27] *Matter of P-*, 19 I. & N. Dec. 823, 828 (BIA 1988) (quoting Black's Law Dictionary 1106 (5th ed. 1979)) (granting a waiver to a "financially successful person who has made substantial contributions of money, time, and talent to the betterment of the community in which he lives").

[28] 22 I. & N. Dec. 215, 217 (BIA 1998).

[29] INA § 212(d)(3)(A) provides in relevant part: "Except as provided in this subsection, an alien (i) who is applying for a nonimmigrant visa and is known or believed by the consular officer to be ineligible for such visa under subsection … may, *after approval by the Attorney General* of a recommendation by the Secretary of State or by the consular officer that the alien be admitted temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily despite his inadmissibility, be granted such a visa and may be admitted into the United States temporarily as a nonimmigrant *in the discretion of the Attorney General*, or (ii) who is inadmissible under subsection (a) … , but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant *in the discretion of the Attorney* General (emphasis added).

[30] The INA § 212(d)(14) waiver remains available to nonimmigrant visa applicants in removal proceedings, but must be sought before USCIS.

[31] 8 C.F.R. § 214.14(c)(1)(i); *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 811 (BIA 2012); *L.D.G*, 744 F.3d at 1032.

§ 212(d)(14) or INA § 212(d)(3)(A) is required to use Form I-192, Application for Advance Permission to Enter as Nonimmigrant.[32] Before *L.D.G.*, the Form I-192 was filed with USCIS. However, in cases in the Seventh Circuit where the U visa applicant is in removal proceedings, the Form I-192 may now also be filed with the IJ.

Importantly, *L.D.G.* does not require an applicant to litigate a waiver request before USCIS or to simultaneously seek a waiver before USCIS in order to request an IJ to adjudicate a waiver. Indeed, *L.D.G.* is silent as to whether an applicant might even seek waiver adjudication when there is no Form I-918 pending with USCIS.[33] However, the Court states that "if the IJ grants a waiver of inadmissibility, the noncitizen can directly seek the relevant relief" with USCIS.[34] This language suggests that an applicant may obtain an INA § 212(d)(3)(A) waiver from an IJ before submitting the U visa petition, while the petition is pending, or even when the U visa has been denied by USCIS.

Judicial efficiency also supports the argument that an applicant should be able to seek adjudication of his or her INA § 212(d)(3)(A) inadmissibility waiver without having a U visa petition pending with USCIS. Federal courts have often expressed concerns regarding the impact of "over compartmentalizing" in the already over-burdened immigration courts.[35] In *L.D.G* the court states that "allowing the IJ to make a global resolution of waiver requests under section [212](d)(3) offers efficiency advantages over compartmentalizing waiver decisions,"[36] noting that "the IJ will become familiar with the facts necessary to make a waiver determination as part of the adjudication of the overall removal proceeding."[37]

This argument has particular force in cases involving detained U visa applicants. Even where USCIS agrees to expedite a U visa application for a detained individual, adjudication of a U visa application accompanied by a waiver application may still take one year or more.[38] Particularly where an applicant has a criminal record, adjudication may be prolonged as USCIS issues Requests for Evidence (RFEs) for additional criminal documentation and additional evidence that the applicant merits a waiver. If an IJ has already decided a U visa applicant's waiver application, USCIS should be able to make a decision on the I-918 in a more timely fashion.[39]

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[32] 8 C.F.R. § 214.14(c)(2)(iv).
[33] *L.D.G*, 744 F.3d at 1032.
[34] *Id*.
[35] *See Moncrieffe v. Holder*, 569 U.S. __ , 15 – 16 (2013) (noting that requiring a fact-finding inquiry for a detained individual is burdensome on the immigration system as a whole); *see also L.D.G*, 744 F.3d at 1031 (stating that "efficiency is no small consideration in an administrative system as backlogged as the U.S. immigration bureaucracy has been").
[36] *Id.*
[37] *Id*. at 1032.
[38] At present, requests for U visas far outnumber the 10,000 statutory cap. *See* INA 214(p)(2). To deal with the shortage of U visas, USCIS has been issuing waitlist letters and Deferred Action status to individuals who would otherwise qualify for a U visa, if a visa were available. For detained applicants, Immigration and Customs Enforcement (ICE) should release the individuals from its custody upon the issuance of Deferred Action.
[39] *L.D.G*, 744 F.3d at 1032.

C. Arguing the Waiver

Section 212(d)(3)(A) waiver petitions submitted to either the IJ or USCIS should address the standard articulated in *Matter of Hranka*:[40]

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, if any; and
3. The applicant's reason for seeking entry.

The BIA did not elaborate on these basic factors in *Hranka*. However, it did clarify that the applicant's reasons for seeking entry to the United States need not be "compelling." This sentiment is further reflected in the Foreign Affairs Manual:

> The law does not require that such action be limited to humanitarian or other exceptional cases. While the exercise of discretion and good judgment is essential, [immigration officials] may recommend waivers for any legitimate purpose...[41]

Accordingly, IJs and the BIA have enormous discretion in deciding whether to grant or deny an INA § 212(d)(3)(A) waiver.

When submitting the INA § 212(d)(3)(A) waiver to either USCIS or the IJ, the applicant should include all evidence relevant to the discretionary factors articulated in *Matter of Hranka*. This may include proof of the U.S. citizenship or lawful permanent resident status of children and/or other family members residing in the United States, certified dispositions of any criminal convictions, including the statutory provisions under which the individual was convicted, copies of income tax returns, a letter from an employer, school and medical records, letters of support from family members and/or friends, and country conditions reports.[42]

U visa applicants should note that USCIS applies a different standard when adjudicating waiver petitions submitted pursuant to INA § 212(a)(d)(14). For the INA § 212(d)(14) U visa inadmissibility waiver to be granted, the applicant must demonstrate that it is in "the national or public interest" to do so.[43] The focus of (d)(14) may be thought to turn on the utility of the prosecution supported by the applicant's testimony. In adjudicating the waiver, USCIS balances the adverse factors of inadmissibility against the social and humanitarian considerations presented, and may grant the waiver in the exercise of discretion.[44] However, if inadmissibility

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[40] 16 I&N Dec. at 492.
[41] 9 FAM 305.4-3(C).
[42] *See* NIJC's Pro Bono Attorney Manual on Immigrant Relief for Crime Victims: U Visas.
[43] 8 C.F.R. § 212.17(b)(1); *compare to Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002); and 8 C.F.R. § 211.7(d) ("exceptional and extremely unusual hardship" can be "extraordinary circumstance").
[44] 8 C.F.R. § 212.17(b)(1); *see also Matter of Mendez-Morales*, 21 I&N Dec. 296 (BIA 1996) (discussing the discretionary factors relevant to the adjudication of INA § 212(h) waivers). For a non-exclusive list of the discretionary factors considered by USCIS, consult NIJC's Pro Bono Attorney Manual on Immigrant Relief for Crime Victims: U Visas.

is based on a violent or dangerous crime, then USCIS will exercise favorable discretion only in extraordinary circumstances.[45]

D. Procedural Matters

Whether applying to USCIS or the IJ, an applicant seeking an INA § 212(d)(3)(A) waiver should submit a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant.[46] When seeking a waiver from the IJ, applicants should expressly list all potential grounds of inadmissibility on Form I-192 to avoid the possibility that USCIS will deny a U visa application because all grounds of inadmissibility have not been waived by the IJ. In addition, counsel should seek an on-the-record statement from DHS Assistant Chief Counsel (ACC) that no other grounds of inadmissibility, beyond those listed on Form I-192, apply. The ACC's statement on behalf of DHS may serve to bind other agencies within DHS, including USCIS.

The applicant should include the $585.00 filing fee or Form I-912 requesting a fee waiver with the I-192 application. There is no current guidance regarding how to fee in I-192 applications filed only with the IJ. For applications filed with the IJ and accompanied by a fee waiver request, the applicant should obtain an order from the IJ granting the fee waiver request, in case USCIS later requests such fees.

Where an applicant has obtained an INA § 212(d)(3)(A) waiver approval prior to filing an I-918 with USCIS, the applicant should include a copy of the I-192 filed with the immigration court, the IJ's fee waiver grant (if applicable), and the IJ's order granting the waiver. The applicant should explain in the cover letter that the IJ has already adjudicated the waiver and that all applicable inadmissibility grounds have already been waived.

Where an I-918 is already pending with USCIS prior to the § 212(d)(3)(A) grant, the applicant should send the above documentation to USCIS and request that it be added to the application package. If USCIS issues an RFE for an I-192 waiver request, the applicant should send this documentation in response to the RFE.

IV. APPEALING A U VISA INADMISSIBILITY WAIVER DENIAL

By regulation, there is no appeal within USCIS of a decision to deny an INA § 212(d)(14) or INA § 212(d)(3)(A) inadmissibility waiver.[47] The only recourse with USCIS is to file a motion to reopen or reconsider the denial of the inadmissibility waiver or to refile the waiver with USCIS.[48]

By contrast, INA § 212(d)(3)(A) waiver applicants in removal proceedings may seek IJ adjudication of a (d)(3)(A) waiver even if their waiver petition has been denied by USCIS. If the IJ denies the applicant's INA § 212(d)(3)(A) waiver, then the applicant may appeal the IJ's

[45] 8 C.F.R. §§ 212.17(b)(1), (2); *compare to Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002); and 8 C.F.R. § 211.7(d) ("exceptional and extremely unusual hardship" can be "extraordinary circumstance").
[46] 8 C.F.R. § 212.17(a).
[47] *Id*. § 212.17(b)(3); *Matter of Hranka*, 16 I&N Dec. at 492.
[48] 8 C.F.R. § 212.17(b)(3).

decision to the Board of Immigration Appeals (BIA). The applicant may seek appellate relief in the federal courts of appeal if the BIA denies the waiver.

Where USCIS has denied an applicant's U visa application on account of a waiver denial, applicants may wish to file an appeal of the denied U visa with USCIS so that the U visa application remains pending. In that posture, the U visa request is preserved so that if the waiver is ultimately granted, a new U visa application should not be required. Where a final U visa denial is in place prior to waiver approval, applicants may seek to reopen the U visa matter, but will likely need to file a new Form I-918 petition with USCIS after the IJ or BIA grants the waiver.

V. STRATEGIES FOR U VISA APPLICANTS WITH INADMISSIBILTY ISSUES IN REMOVAL PROCEEDINGS

- **Should I wait for USCIS to adjudicate the waiver before requesting IJ adjudication?**

The *L.D.G.* decision does not address when and how an applicant must seek a section 212(d)(3)(A) waiver. An applicant may seek a waiver either before USCIS or the IJ, and may in fact choose to seek waivers before both simultaneously, though this is not required. For non-detained clients, it is generally advisable to first file a waiver application with USCIS, as USCIS may adjudicate a waiver prior to an applicant receiving an individual hearing date with an IJ. If USCIS denies a waiver, applicants may then seek a waiver from the IJ. The adjudication of the waiver by the IJ is not a review of the USCIS decision but rather *de novo* adjudication.[49]

Seeking consecutive – rather than concurrent – adjudication by the IJ may afford applicants additional time to gather evidence and otherwise strengthen equities in their cases. It also may put applicants on notice as to what grounds of inadmissibility USCIS has deemed applicable in their case.

For detained applicants, it is generally advisable to file a section 212(d)(3)(A) waiver with the IJ without waiting for USCIS adjudication, and then to provide the waiver grant to USCIS. A detained applicant will almost certainly have an individual hearing on the waiver application before USCIS reviews the U visa application. A positive waiver decision from the IJ should decrease USCIS's adjudication time, because USCIS will not need to consider the waiver.

- **What should I do if my client is an LPR? Can she receive a U visa while still in LPR status? If not, how do I "down-shift" her status?**

USCIS currently takes the position that a LPR cannot be granted a U visa. Although the legal authority for this position is unsettled, this may present issues for a LPR in removal proceedings who is deportable but eligible for a U visa with a waiver. For these cases, one strategy is to apply for the INA § 212(d)(3)(A) waiver before the IJ and once granted, request that the IJ terminate LPR status to allow the client to pursue the U visa before USCIS. The client should then file the I-918, U visa petition with USCIS with the order from the IJ terminating LPR status and approving the 212(d)(3)(A) waiver.

[49] *L.D.G*, 744 F.3d at 1032.

- **My client's U visa application has already been denied by USCIS. Do I need to file a new I-918 before an IJ can consider my waiver application?**

The ACC may argue that an IJ has no jurisdiction to consider a section 212(d)(3)(A) waiver application unless an I-918 U visa petition is currently pending with USCIS. However, *L.D.G.* contemplates that an applicant may obtain a waiver prior to filing a U visa application and should be cited if the ACC argues otherwise. Chicago IJs have considered and granted section 212(d)(3)(A) waivers where a U visa was not on file with USCIS.

- **The judge has granted my client's (d)(3)(A) waiver request, how do I inform the USCIS Vermont Service Center? What happens next?**

If an applicant has obtained a section 212(d)(3)(A) grant prior to filing an I-918 with USCIS, the applicant should submit the I-918 petition for U visa with USCIS with a copy of the I-192 filed with the immigration court, the IJ's fee waiver grant (if applicable), and the IJ's order granting the waiver. The applicant should explain in the cover letter that the IJ has already adjudicated the waiver.

If an I-918 is already pending with USCIS prior to the section 212(d)(3)(A) grant, the applicant should send USCIS the copy of the I-192 filed with the immigration court, the IJ's fee waiver grant (if applicable), and the IJ's order granting the waiver and request that it be added to the I-918 petition. The best practice is to send this documentation in response to a RFE. For cases that have not been issued a RFE, the applicant should first email USCIS Vermont Service Center at hotlinefollowupi918i914.vsc@dhs.gov to advise the Center that he or she is mailing the documents and second, mail the documentation requesting that the waiver grant be consolidated with the pending U visa petition.

- **Can USCIS second-guess an IJ waiver approval? Or can USCIS find that other grounds of inadmissibility apply that were not waived by the IJ?**

Practitioners report that USCIS has refused to honor an IJ waiver approval in at least one instance, finding that that the IJ did not waive all applicable grounds of inadmissibility. The legality of USCIS second guessing the IJ is unsettled. However, an applicant can avoid this issue by ensuring that all possible inadmissibility grounds are listed on the Form I-192 being adjudicated by the IJ. In addition, the applicant should request that the ACC affirm on the record that all inadmissibility grounds that apply are included in the waiver application.

- **What protects my client from removal between the time an IJ grants a (d)(3)(A) waiver and USCIS U visa adjudication?**

After an IJ grants a 212(d)(3)(A) waiver, applicants should request that removal proceedings be continued or administratively closed for adjudication of the U visa petition by USCIS. This prevents a removal order being entered against the U visa applicant while USCIS is still adjudicating the U visa petition.

If an IJ orders removal while simultaneously granting the 212(d)(3)(A) waiver, the applicant should immediately seek a stay of removal with ICE during the pendency of the U visa adjudication with USCIS. An applicant can request a stay with ICE by filing Form I-246 with

the assigned deportation officer. Applicants should include a copy of their U visa application as well as the waiver documentation filed with the IJ. ICE may be reluctant to grant a stay of removal to an applicant with a criminal record. In such cases, an applicant should advocate for ICE to refrain from acting on a removal order while the U visa petition is pending.

- **My client has already been ordered removed. Can I reopen proceedings in order to seek a (d)(3)(A) waiver before the IJ?**

Some clients may choose to file a U visa petition with USCIS while they have an outstanding removal order. While the U visa is pending, or if USCIS denies the U visa because the client is inadmissible and USCIS declines to grant the waiver, applicants could consider seeking to reopen removal proceedings to request IJ adjudication of the waiver. It may be possible to reopen if OCC agrees to join in the motion to reopen, if the judge agrees to do it *sua sponte*, or if there is another statutory or regulatory basis to reopen pursuant to INA § 240(c)(7) or 8 C.F.R. §§ 1003.3, 1003.23. In those cases, applicants should file their motions to reopen with evidence of waiver eligibility and should demonstrate that the U visa is pending before USCIS or that it was erroneously denied due to an improper waiver denial by USCIS.

- **My client has never been in removal proceedings. Can I ask to have proceedings initiated in order to seek a waiver before the IJ?**

Some clients may request the initiation of removal proceedings in order to apply for a U visa waiver before the IJ. The availability of this option varies across the country and depends on the willingness of local ICE officers to initiate removal proceedings for a non-citizen to seek immigration relief.

CONCLUSION

The practical implications of *L.D.G.* are evolving as the IJs and USCIS respond to non-citizens who apply for waiver adjudication. Practitioners representing U visa applicants should be familiar with the *L.D.G.* decision and ensure that noncitizens crime victims in removal proceedings have full access to U visa protections, including 212(d)(3)(A) waiver adjudication before the immigration court and BIA.