

**PRACTICE ADVISORY<sup>1</sup>**  
**U VISA INADMISSIBILITY WAIVERS IN REMOVAL PROCEEDINGS**

By the National Immigrant Justice Center  
December 2017

**INTRODUCTION**

Because the U visa statute references the adjudicatory authority of the Department of Homeland Security over applications for U nonimmigrant visas, the Board of Immigration Appeals (BIA) has taken the position that only DHS can grant a U visa and any associated waivers.<sup>2</sup> However, regulations allow a U visa applicant to seek a (d)(3) waiver to cure U visa inadmissibility.<sup>3</sup> And BIA case law and regulation have long allowed immigration judges (IJs) a role in the (d)(3) process.<sup>4</sup> Applying these two propositions, the Seventh Circuit has held that U visa applicants in removal proceedings may request a § 212(d)(3) waiver from an IJ, which may be used to cure any inadmissibility for the U visa.<sup>5</sup> This practice advisory provides guidance to practitioners inside the Seventh Circuit who wish to request IJ or BIA adjudication of their waivers of admissibility. It is also intended to help litigants in other jurisdictions to effectively argue to other courts and to the Board that noncitizen crime victims in removal proceedings should be allowed to access U visa protections before the immigration court.

**I. U VISA AND ASSOCIATED WAIVERS**

The U visa is a nonimmigrant visa created by Congress in 2000 to protect noncitizen victims of serious crimes who have assisted in the investigation and/or prosecution of certain crimes.<sup>6</sup> If approved, the U visa allows noncitizen 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.<sup>7</sup> U visa recipients become eligible to adjust status and apply for lawful permanent residence (LPR) after three years in U nonimmigrant status.<sup>8</sup> Typically, after five years as a lawful

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<sup>2</sup> *Matter of Khan*, 26 I. & N. Dec. 797 (BIA 2016).

<sup>3</sup> 8 C.F.R. § 212.17(b)(1).

<sup>4</sup> *See, e.g.*, 8 C.F.R. § 212.4(b); *Matter of Hranka*, 16 I&N Dec. 491 (BIA 1978).

<sup>5</sup> *L.D.G. v. Holder*, 744 F.3d 1022 (7th Cir. 2014); *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017).

<sup>6</sup> Victims of Trafficking and Violence Protection Act of 2000 (TVPA), Pub. Law. No. 106-386, § 1513(a)(2).

<sup>7</sup> INA § 214(p)(6).

<sup>8</sup> INA § 245(m).

permanent resident, LPRs are eligible to apply for U.S. citizenship.<sup>9</sup> For a more comprehensive overview of U visas, please consult NIJC's [Pro Bono Attorney Manual on Immigration Relief for Crime Victims: U Visas](#).

If a U visa applicant is inadmissible under INA § 212(a), then he or she must seek and receive a waiver for any applicable inadmissibility grounds in order for the U visa to be granted.<sup>10</sup> By regulation, there are two waivers available for U visa applicants: the general nonimmigrant waiver at INA § 212(d)(3)(A) and a U-visa-specific waiver at INA § 212(d)(14).<sup>11</sup> Most, but not all, inadmissibility grounds may be waived by these waivers.<sup>12</sup>

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.<sup>13</sup>

Under INA § 212(d)(3)(A), any inadmissibility grounds except for those pertaining to sabotage, espionage, genocide, and participation in Nazi persecution may be waived.<sup>14</sup>

The waiver at INA § 212(d)(14) has slightly different eligibility bars, and employs a different standard. The INA § 212(d)(14) waiver is available to waive all grounds except bars relating to Nazi persecution, genocide, torture, or extrajudicial killing.<sup>15</sup> The statutory standard for a (d)(14) waiver permits that a waiver may be granted "if the Secretary of Homeland Security considers it to be in the public or national interest." This precise formulation is not found elsewhere in the INA, and no case law exists on this point due to the regulatory prohibition on appeals within USCIS.<sup>16</sup> It allows for a waiver if the applicant meets either the public interest or national interest standards, standards employed elsewhere in the INA.<sup>17</sup> In the legalization

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<sup>9</sup> INA § 316.

<sup>10</sup> 8 C.F.R. § 212.17.

<sup>11</sup> 8 C.F.R. §§ 212.17(a), (b).

<sup>12</sup> 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).

<sup>13</sup> *Matter of Hranka*, 16 I&N Dec. 491, 492 (BIA 1978).

<sup>14</sup> 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).

<sup>15</sup> 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.

<sup>16</sup> 8 C.F.R. § 212.17(b)(3).

<sup>17</sup> 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).

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.”<sup>18</sup> The national interest waiver analysis in *In re New York State Dept. of Transportation*<sup>19</sup> – 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. Case law has not yet explicated the precise standards for the (d)(14) waiver, nor has it addressed the utility of case law in unrelated areas for assessing (d)(14) applications.

In addition to statutory eligibility, the applicant must also show that she merits relief in the exercise of discretion. By regulation, USCIS will not exercise discretion positively to waive criminal inadmissibility for “violent or dangerous” offenses, except in “exceptional circumstances.”<sup>20</sup> These provisions stem from the Attorney General decision in *Matter of Jean*, reversing a grant of a refugee waiver.<sup>21</sup> While this particular regulation does not apply to IJ determinations, the BIA has held in unpublished decisions that it would apply that same standard to IJ adjudications in this area.<sup>22</sup> Case law has not entirely clarified when an offense qualifies as “violent or dangerous.” The BIA has suggested that a facts-and-circumstances approach is appropriate,<sup>23</sup> which seems also to be the position of the Ninth Circuit.<sup>24</sup> The Eleventh Circuit, joined by the Seventh, seems to allow the Board to apply either the facts-and-circumstances test or a categorical test.<sup>25</sup>

## II. THE LEGAL DISPUTE OVER IJ JURISDICTION

There have been four published court opinions addressing the question of IJ jurisdiction over U visa waivers. The first published decision came from the Seventh Circuit in *L.D.G. v. Holder*.<sup>26</sup> *L.D.G.* held that the IJ’s traditional authority over § 212(d)(3) waivers continued in effect.<sup>27</sup> The Third Circuit disagreed with *L.D.G.* in a published opinion, *Sunday v. U.S. Att’y Gen’l.*<sup>28</sup> In *Matter of Khan*, the BIA agreed with *Sunday*’s conclusion (though not all of its reasoning) and rejected *L.D.G.* even within the Seventh Circuit.<sup>29</sup> That led to the most recent court opinion, a

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<sup>18</sup> *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”).

<sup>19</sup> 22 I. & N. Dec. 215, 217 (BIA 1998).

<sup>20</sup> 8 C.F.R. § 212.17(b)(2).

<sup>21</sup> *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002).

<sup>22</sup> See *In re: Jorge Baez-Sanchez*, A 206-017-181 at 2-3 (BIA Feb. 23, 2016) (unpublished).

<sup>23</sup> See *Matter of Dominguez-Rodriguez*, 26 I. & N. Dec. 408, 413 n.9 (BIA 2014).

<sup>24</sup> See *Rivas-Gomez v. Gonzales*, 225 Fed.Appx. 680, 683 (9th Cir. 2007) (nonprecedential); cf. *Torres-Valdivias v. Lynch*, 786 F.3d 1147, 1152 (9th Cir. 2015) (allowing Board discretion not to apply a categorical approach in determining whether a crime was “violent or dangerous”).

<sup>25</sup> *Makir-Marwil v. U.S. Att’y Gen.*, 681 F.3d 1227, 1235 (11th Cir. 2012) (requiring “neither a ‘categorical’ nor a ‘fact-based’ approach to determining whether a refugee’s conviction renders him a ‘violent or dangerous individual,’” only “an adequate consideration of the nature of the refugee’s crime”); *Cisneros v. Lynch*, 834 F.3d 857, 865-66 (7th Cir. 2016)

<sup>26</sup> 744 F.3d 1022 (7th Cir. 2014).

<sup>27</sup> *Id.* at 1026

<sup>28</sup> *Sunday v. Att’y. Gen’l.*, 832 F.3d 211 (3d Cir. 2016).

<sup>29</sup> *Matter of Khan*, 26 I. & N. Dec. 797 (2016).

Seventh Circuit decision in *Baez-Sanchez v. Sessions*.<sup>30</sup> *Baez-Sanchez* reaffirmed *L.D.G.*, and rejected the reasoning of *Sunday* and *Khan*.

This Practice Advisory explains the relevant legal arguments in detail. As it stands, litigants in the Seventh Circuit may apply for a § 212(d)(3) waiver before the immigration court, while litigants elsewhere may not. NIJC would urge litigants seeking to expand the Seventh Circuit’s rule to other circuits to contact NIJC before proceeding forward with that litigation.

### **III. DECISION IMPLICATIONS FOR U VISA APPLICANTS IN REMOVAL PROCEEDINGS**

This section presents an analysis of the broader implications of the Seventh Circuit’s test and sets forth strategic considerations when deciding whether to request IJ/BIA waiver adjudication.

#### **A. Implications of Joint Jurisdiction**

Having held that INA § 212(d)(3)(A) grants the Attorney General authority over waivers of inadmissibility filed by nonimmigrants,<sup>31</sup> the next question was how that authority intersects with the authority of USCIS. *L.D.G.* did not specify 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 U visa petition itself.<sup>32</sup> A U visa applicant seeking an inadmissibility waiver under either INA § 212(d)(14) or INA § 212(d)(3)(A) is required to use Form I-192, Application for Advance Permission to Enter as Nonimmigrant.<sup>33</sup> Under *L.D.G.*, in cases where the U visa applicant is in removal proceedings, the Form I-192 may now be filed with the IJ or USCIS or both.

*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. Under *L.D.G.* an applicant may even seek waiver adjudication before the IJ without filing Form I-918 with USCIS.<sup>34</sup> *L.D.G.* held that “if the IJ grants a waiver of inadmissibility, the noncitizen can directly seek the relevant relief” with USCIS.<sup>35</sup> Under the Seventh Circuit’s approach, 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 when the U visa has been denied by USCIS.

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<sup>30</sup> *Baez-Sanchez v. Sessions*, 872 F.3d 854 (7th Cir. 2017);

<sup>31</sup> 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).

<sup>32</sup> 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.

<sup>33</sup> 8 C.F.R. § 214.14(c)(2)(iv).

<sup>34</sup> *L.D.G.*, 744 F.3d at 1032.

<sup>35</sup> *Id.*

Judicial efficiency is advanced where applicants can seek adjudication of the (d)(3)(A) waiver without waiting for a USCIS decision. *L.D.G* found this efficient because “the IJ will become familiar with the facts necessary to make a waiver determination as part of the adjudication of the overall removal proceeding.”<sup>36</sup> 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.<sup>37</sup> USCIS frequently issues Requests for Evidence (RFEs) for additional documentation and evidence to decide whether an 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.<sup>38</sup>

## **B. Arguing the Waiver**

When seeking a waiver from USCIS, NIJC recommends that applicants try to meet the standards under both INA § 212(d)(14) and § 212(d)(3)(A). Applicants should submit distinct arguments as to each waiver request, though there will naturally be overlap (and we see no need to duplicate declarations or other evidentiary submissions). Before USCIS it probably makes sense in most cases to primarily argue as to the waiver standard at INA § 212(d)(14). Eligibility for a waiver under INA § 212(d)(14) requires the applicant to demonstrate that it is in “the national or public interest” to grant the waiver.<sup>39</sup> 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.<sup>40</sup> As explained below, if inadmissibility is based on a violent or dangerous crime, then USCIS will exercise favorable discretion only in extraordinary circumstances.<sup>41</sup>

Waiver applications under § 212(d)(3)(A), regardless of whether before the IJ or USCIS, should address the standard articulated in *Matter of Hranka*.<sup>42</sup>

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.

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<sup>36</sup> *Id.* at 1032.

<sup>37</sup> 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.

<sup>38</sup> *L.D.G*, 744 F.3d at 1032.

<sup>39</sup> 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”).

<sup>40</sup> 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](#).

<sup>41</sup> 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”).

<sup>42</sup> 16 I&N Dec. at 492.

The *Hranka* standard leaves adjudicators with enormous discretion in deciding whether to grant or deny an INA § 212(d)(3)(A) waiver. 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...<sup>43</sup>

It should be noted that by regulation, if the criminal offense to be waived was “violent or dangerous,” a heightened showing is required for relief. 8 C.F.R. § 212.17(b). By regulation, USCIS will not exercise discretion positively to waive criminal inadmissibility for “violent or dangerous” offenses, except in “exceptional circumstances.”<sup>44</sup> These provisions stem from the Attorney General decision in *Matter of Jean*, which reversed the BIA’s grant of a waiver.<sup>45</sup> While § 212.17(b) on its face only applies to USCIS decisions, the BIA has held in unpublished decisions that it would apply that same standard to IJ adjudications.<sup>46</sup> Some of the issues flowing from *Jean* are discussed above.

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, friends and community, and country conditions reports.<sup>47</sup>

### C. Procedural Matters

Whether applying to USCIS or the IJ, an applicant seeking a § 212(d)(3)(A) waiver should submit a Form I-192, Application for Advance Permission to Enter as a Nonimmigrant.<sup>48</sup> 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 find that it cannot grant a U visa application without deciding whether to waive additional grounds of inadmissibility. In addition, counsel should seek an on-the-record statement from DHS Office of Chief Counsel (OCC) that no other grounds of inadmissibility apply. The OCC’s statement on behalf of DHS may serve to bind other agencies within DHS, including USCIS. It could also be useful for the IJ waiver decision itself to expressly list the grounds of inadmissibility waived; but if the IJ does this, it becomes doubly important to make sure that all relevant grounds are listed in that decision.

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<sup>43</sup> 9 FAM 305.4-3(C).

<sup>44</sup> 8 C.F.R. § 212.17(b)(2).

<sup>45</sup> *Matter of Jean*, 23 I. & N. Dec. 373 (A.G. 2002).

<sup>46</sup> See *In re: Jorge Baez-Sanchez*, A 206-017-181 at 2-3 (BIA Feb. 23, 2016) (unpublished).

<sup>47</sup> See NIJC’s [Pro Bono Attorney Manual on Immigrant Relief for Crime Victims: U Visas](#).

<sup>48</sup> 8 C.F.R. § 212.17(a).

The applicant should include the \$930.00 filing fee or Form I-912 and supporting documentation requesting a fee waiver with the I-192 application. There is no current guidance regarding how to fee-in I-192 applications filed initially with the IJ. Until guidance is forthcoming, NIJC would suggest attempting to pay fees in person at the local USCIS office, where a supervisor's involvement may be requested if necessary. Problems also be anticipated that when requesting a biometrics appointment, for any applicant who is nondetained. Applicants would be wise to leave additional time for this process. Of course, if the noncitizen has previously paid the fee to USCIS, they should simply submit proof of that payment to the IJ.

Where applications are filed with the IJ and accompanied by a fee waiver request, the applicant should seek a written order from the IJ granting the fee waiver request. This should help facilitate subsequent USCIS action, to avoid a USCIS later request for fees.

Where an applicant has obtained a waiver under INA § 212(d)(3)(A) 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, and then an IJ grants a § 212(d)(3)(A) waiver, the applicant should send the waiver grant 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. OUTSTANDING LEGAL QUESTIONS**

##### **A. Lawful Permanent Residents and U Visas.**

There is no published authority from USCIS, the BIA, or the courts addressing whether someone may move directly from lawful permanent resident (LPR) status directly to U nonimmigrant status. NIJC sees no reason why an LPR cannot move from LPR to U nonimmigrant status, but some agency adjudicators have found this point problematic. This section explains why there is no statutory or regulatory problem in such a move; but also how to argue around adjudicators who are unconvinced on this point.

U visa status is nonimmigrant status, but an applicant for a U visa does not apply for U status on the change of status form, USCIS form I-539, nor does she need to meet the standards generally applicable to a change of status application.<sup>49</sup> U visa applicants need not be in current nonimmigrant status; and nothing in § 248 makes a permanent resident ineligible to apply for U status. Just as noncitizens lacking any lawful status may seek U status, so, too, noncitizens holding lawful status seek may that classification. Of course, an LPR would generally want to seek U visa status only if the LPR was deportable on some ground and ineligible for any other relief which would preserve her LPR status.

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<sup>49</sup> INA § 248(a) generally permits an individual to change "from any nonimmigrant classification to any other," but this general rule is inapplicable in the U visa context. INA § 248(b) provides that the "exceptions specified in" 248(a)(1)-(4) "shall not apply" to U Visa applicants.

Some authority holds that a noncitizen may not simultaneously hold immigrant and nonimmigrant status.<sup>50</sup> The authority does not hold that a noncitizen may not hold one status while *seeking* another; but simply that she may not simultaneously *hold* two statuses at the same time.<sup>51</sup> There may be reasons not to apply this logic in the U context.<sup>52</sup> But assuming that the general rule is applicable in this context, the question arises: through what process can an LPR move from permanent resident to nonimmigrant status, if she cannot hold both simultaneously?

USCIS's Administrative Appeals Office ("AAO") has issued some unpublished decisions finding that an LPR seeking U visa status must terminate their LPR status in order to seek U visa status.<sup>53</sup> The AAO reasoning is that an applicant must be eligible for relief at the time of filing an application; so if an LPR cannot obtain U visa status, the LPR likewise cannot seek it.<sup>54</sup> This logic is dubious. The authority cited by the AAO relates to noncitizen beneficiaries of employment petitions who were substantively not eligible to be approved at the time of filing.<sup>55</sup> But a rule holding that a noncitizen cannot simultaneously be both a nonimmigrant and an immigrant is an entirely different sort of rule. If one status is terminated when another is obtained, then the noncitizen never has two statuses; which suggests that the rule is a processing rule rather than a rule governing substantive eligibility. Indeed, the flaw in this logic can be dispelled by the obvious example of adjustment of status; nonimmigrants may seek to adjust status to become permanent residents without first seeking an end to their nonimmigrant status.<sup>56</sup> Indeed, a prohibition on holding two statuses at a time prohibited adjustment of status could not apply to prohibit adjustment applications without in effect nullifying the adjustment statute as to nonimmigrants. In NIJC's view, then, LPR status need not be ended before an individual applies for U visa status.

While NIJC disagrees with the putative requirement that LPR status must be terminated before seeking U visa status, some adjudicators believe this to be the case. Therefore, we address below some ways to terminate LPR status and the various upsides and downsides to each.

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<sup>50</sup> *Matter of A*, 6 I&N Dec. 651 (BIA 1955).

<sup>51</sup> *Matter of A*, 6 I&N Dec. 651 (BIA 1955).

<sup>52</sup> Brief for Amicus Curiae ASISTA, 4-5, available at

[http://www.asistahelp.org/documents/resources/ASISTA\\_Brief2\\_re\\_LPR\\_and\\_U\\_Eligibil\\_DB40DC89AA421.pdf](http://www.asistahelp.org/documents/resources/ASISTA_Brief2_re_LPR_and_U_Eligibil_DB40DC89AA421.pdf).

<sup>53</sup> See *In Re: Petitioner: XXXX*, Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. S 1101(a)(15)(U), 2015 WL 451836, at \*2, USCIS Administrative Appeals Unit (Jan. 7, 2015) ("When she filed the Form I-918 U petition in April 2013, the petitioner was a lawful permanent resident and such status did not terminate until June 2014 when she was ordered removed from the United States by the Board. Even though the petitioner's lawful permanent resident status terminated upon entry of the final administrative order of removal, eligibility for a benefit request must be established at the time of the filing of the petition.") (citations omitted).

<sup>54</sup> See *In Re: Petitioner: XXXX*, Petition for U Nonimmigrant Classification as a Victim of a Qualifying Crime Pursuant to Section 101(a)(15)(U) of the Immigration and Nationality Act, 8 U.S.C. S 1101(a)(15)(U), 2015 WL 3545570, at \*2 USCIS Administrative Appeals Unit (May 15, 2015) (citing *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg'l Comm'r 1978)).

<sup>55</sup> *Id.*

<sup>56</sup> See INA §§ 245(a), (c).



By regulation and case law, LPR status certainly ends with the entry of an administratively final removal order.<sup>57</sup> A final removal order thus has the upside of clearly terminating LPR status. However, this approach has substantial downsides. If the applicant must wait until entry of a removal order in order to apply for relief, there will generally be a substantial period of time between the entry of the removal order and the approval (assuming there is an approval) of U visa status. During this period, the noncitizen would have an outstanding removal order. ICE may decide to seek to execute the removal order; it is unclear whether the noncitizen could effectively resist removal if that happens.

Some litigants have asked IJs to enter orders declaring that LPR status is terminated without entering a removal order. The authors have located no authority expressly addressing IJ authority to enter a termination of status order, but an IJ's general authority to enter appropriate rulings in cases that come before them would seem broad enough to include such a ruling.<sup>58</sup> Regulations specify that LPR status terminates with a final removal order.<sup>59</sup> But the regulations do not specify that LPR status terminates *only* with a final removal order; they say simply that "[s]uch status terminates upon entry of a final administrative removal order."<sup>60</sup> This does not exclude the possibility that status could terminate earlier. And indeed, there is substantial authority for the proposition that LPR status *can* terminate earlier, such as after abandonment of status by taking up residence abroad.<sup>61</sup> The difficulty with this approach is not so much whether the IJ could terminate LPR status, but rather, when the IJ's termination order would become final (where the IJ does not order removal). Generally, an IJ's decisions become final only after both sides waive the right to appeal, after the time for appeal passes, or after the BIA upholds the IJ order.<sup>62</sup> In a contested (d)(3) proceeding, DHS is unlikely to waive appeal, so a termination order may be non-final for years, simply because of the parties' appeal rights. An applicant who filed for a U visa while the IJ termination order was non-final would be subject to the same objections as other LPRs seeking U visa status: i.e., that LPR status has not been terminated.

In the view of the authors, an IJ order terminating LPR status is not as effective as a simple, express renunciation of LPR status. Where a permanent resident undertakes acts showing an intent to renounce or abandon LPR status, those acts are sufficient for a finding of abandonment of LPR status in and of themselves.<sup>63</sup> The execution of Form I-407, expressly renouncing residency, manifests an even clearer intent to relinquish lawful residence.<sup>64</sup> Even if I-407 does not permit filing of that form within the United States, it is not the form which has effect, but the express intention to renounce LPR status which is shown by the filing of that form. To the extent it is necessary to end LPR status before applying for U visa status, express renunciation

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<sup>57</sup> 8 C.F.R. § 1.2; 8 C.F.R. § 1001.1(p); *Matter of Lok*, 18 IN Dec. 101, 105-07 (B.I.A. 1981).

<sup>58</sup> 8 C.F.R. § § 1003.10(a); *see Baez-Sanchez v. Sessions*, 872 F.3d 854, 855 (7th Cir. 2017).

<sup>59</sup> 8 C.F.R. § 1.2; 8 C.F.R. § 1001.1(p).

<sup>60</sup> 8 C.F.R. § 1001.1(p).

<sup>61</sup> *Matter of Duarte*, 18 I.& N. Dec. 329, 323, n.3 (BIA 1982) (finding in addition to a final administrative order of exclusion and deportation, a person could "have been ... divested of his lawful permanent resident status ... through abandonment, intentional or unintentional.").

<sup>62</sup> 8 C.F.R. § 1240.14; 8 C.F.R. § 1003.39 ("Except when certified to the Board, the decision of the Immigration Judge becomes final upon waiver of appeal or upon expiration of the time to appeal if no appeal is taken whichever occurs first.").

<sup>63</sup> 22 C.F.R. § 42.22; 8 C.F.R. § 316.5(c)(1)(i), (2).

<sup>64</sup> *See Matter of Montero*, 14 I&N Dec. 399, 401 (BIA 1973) (finding that a voluntary statement of renunciation of LPR status, signed before an immigration officer, was corroborating evidence of loss of residence)

appears the most efficacious way to accomplish that result. It *might* be appropriate to request that the IJ make an express finding that there has been a renunciation and that the renunciation was knowing and intelligent, and had the effect of terminating LPR status. Such an order would not terminate LPR status itself, but would merely recognize in a clear and indisputable way that LPR status had been terminated.

That said, NIJC does not endorse this approach, because it is simply incorrect to say that the law requires LPR status to have ended prior to making an application for U status. The better view of the legal authorities is that while LPR status cannot coexist with nonimmigrant status, that rule is vindicated if LPR status is understood to terminate prior to, or upon, a grant of U visa status, rather than prior to filing. There is authority for the proposition that individuals who receive nonimmigrant status are abandoning LPR status.<sup>65</sup> In NIJC's view, it should be unnecessary for the noncitizen to say anything at all beyond the declarations that are part of the U Visa process. That said, until the law becomes clearer, it seems safest for an applicant to expressly state—in the affidavit submitted with a U visa application—that the applicant wishes to renounce his LPR status upon a grant of nonimmigrant U status.

To summarize, nothing in the law or regulations prohibits an LPR from seeking U visa status. To the extent that a given client is before agency adjudicators who will not approve the case without termination of LPR status, the best route is to make an express renunciation of LPR status, and ideally to secure an IJ order noting this renunciation and finding it knowing and intelligent. Given the unsettled case law in this area and the manifold differences between applicants,<sup>66</sup> advocates will need to choose the route that has the least downside risks for each client. And applicants may well need to go into federal court to vindicate their rights under the statute.

#### **B. A grant under § 212(d)(3) does not require entry of a removal order.**

Some immigration judges considering a (d)(3) waiver for a U visa applicant have entered removal orders upon granting the nonimmigrant waiver application. This approach is unnecessary and inappropriate.

U visa status is a proper lawful status. U visa status is not designated as temporary, and the INA contains provisions allowing U visa holders to move toward permanent legal status.<sup>67</sup> It is true that the (d)(3) waiver itself does not (and cannot) grant U status, but in this context, the waiver is being considered for the purpose of the U visa application. U visa status is therefore inconsistent with entry of a removal order.<sup>68</sup>

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<sup>65</sup> See *Singh v. INS*, 115 F.3d 1512, 1515 (9th Cir. 1997) (concluding that applying for nonimmigrant visa and repeated entries on it “were evidence that Singh did not intend to remain a permanent resident of the United States”).

<sup>66</sup> For many applicants, renouncing LPR status would have little cost. For instance, LPR status is not relevant to asylum, withholding of removal, or protection under the Convention Against Torture. In other cases, an applicant might have legal arguments against removal that depend on LPR status, such as where the noncitizen may have a defense to removability altogether or may be able to seek cancellation of removal for permanent residents.

<sup>67</sup> INA § 245(m).

<sup>68</sup> The question does become somewhat closer because a successful U applicant is generally placed on a waiting list until a number becomes available; that is, they are not generally able to move directly into U status. 8 C.F.R. § 212.14(d)(2). But the end result is the same; the waiting list is regulatory, not discretionary, and the applicant moves

There are other contexts in immigration law in which IJs grant relief while simultaneously ordering removal. For instance, the BIA requires IJs to enter removal orders when granting withholding of removal.<sup>69</sup> The Board reasons that a withholding grant does not impugn the removal order, but merely enjoins its execution as to a particular country.<sup>70</sup> The Board has held similarly as to Temporary Protected Status (TPS): TPS prevents removal for a period, but does not impede the entry of a removal order.<sup>71</sup> NIJC doubts the Board's approach in those contexts.<sup>72</sup> But whatever the merits of entering a removal order while granting withholding or TPS, that logic does not apply here, because U visa status is proper legal status and is not designated as temporary in statute.

Administrative closure would generally not be appropriate. Administrative closure is a docket management tool used to “temporarily remove a case from an Immigration Judge’s active calendar.”<sup>73</sup> Administrative closure does not result in a final order.<sup>74</sup> Rather, it in effect pauses the removal proceedings, functioning as a continuance of indeterminate length.<sup>75</sup> The BIA has held, for U visa applicants as with other applicants, that there a “a rebuttable presumption that an alien who has filed a prima facie approvable application with the USCIS will warrant a favorable exercise of discretion for a continuance for a reasonable period of time”<sup>76</sup> However, in this context, administrative closure not very useful. Because administrative closure prevents a case from becoming final, it prevents the appeal period from beginning or ending, and it would preclude the § 212(d)(3) grant from becoming administratively final.<sup>77</sup> As such, administrative closure means that the IJ case has not resolved, even if the IJ has proceeded forward and granted the § 212(d)(3) waiver.<sup>78</sup> For nondetained cases, the harm from an administrative closure order may be less than the potential harm from an order of removal, since it will leave the noncitizen in the United States, albeit without proper status or work authorization. But administrative closure

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into U visa status “providing the petitioner remains admissible and eligible for U nonimmigrant status.” 8 C.F.R. § 212.14(d)(2).

<sup>69</sup> *Matter of I-S- & C-S-*, 24 I&N Dec. 432, 434 (BIA 2008).

<sup>70</sup> *Matter of I-S- & C-S-*, 24 I&N Dec. 432, 434 (BIA 2008).

<sup>71</sup> *Matter of Sosa Ventura*, 25 I&N Dec. 391, 393 (BIA 2010).

<sup>72</sup> Requiring immediate entry of a removal order for someone in TPS status effectively forces her to choose between Voluntary Departure and TPS, since a Voluntary Departure period cannot exceed 120 days. INA § 240B. The practice of entering a “blank check” removal order unconnected to any country of removal undermines statutory and constitutional rules requiring notice of the country of removal, *see Kossov v. INS*, 132 F.3d 405 (7th Cir. 1998); *Kuhai v. I.N.S.*, 199 F.3d 909 (7th Cir. 1999), as well as the statutory fairness requirement of INA § 240(b)(4)(B) (giving alien a “reasonable opportunity... to present evidence on the alien’s own behalf”). The Seventh Circuit has noted but deferred judgment on these arguments. *See Zahren v. Holder*, 637 F.3d 698, 699 (7th Cir. 2011) (finding it unnecessary to reach these issues in light of remand on other grounds).

<sup>73</sup> *Matter of Avetisyan*, 25 I. & N. Dec. 688, 692 (BIA 2012).

<sup>74</sup> *Matter of Avetisyan*, 25 I. & N. Dec. 688, 695 (BIA 2012)

<sup>75</sup> *Matter of W-Y-U-*, 27 I. & N. Dec. 17, 18 (BIA 2017).

<sup>76</sup> *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 815 (BIA 2012) (citing *Matter of Hashmi*, 24 I&N Dec. 785, 790 (BIA 2009)).

<sup>77</sup> This is why the BIA characterizes administrative closure appeals as interlocutory. *See Matter of W-Y-U-*, 27 I. & N. Dec. 17, 17 (BIA 2017).

<sup>78</sup> *Matter of W-Y-U-*, 27 I. & N. Dec. 17, 19-20 (BIA 2017).

means that the IJ proceedings have not resolved anything; and certainly in the detained context, leaving a noncitizen detained without forward movement in the case is very suboptimal.<sup>79</sup>

If an IJ feels herself compelled to enter a removal order, this puts the applicant in a difficult position. Appeal is available to the BIA, but appeal (by either side) means that the IJ order remains non-final until the Board decides the appeal. Not appealing means that a removal order is in place. Whether to appeal or not may depend on the likelihood that ICE will move to execute the removal order. Certainly a U applicant may seek a stay of removal from ICE, and ICE is supposed to stay removal to permit a determination of whether the applicant has made out a prima facie claim.<sup>80</sup> But given current enforcement efforts, relying on the prosecutorial discretion of ICE is at best a doubtful proposition. NIJC recommends that a noncitizen contest entry of a removal order and appeal to the BIA from any removal order which is entered.

To summarize, an IJ waiver grant only becomes final when the case is over, by termination or by a removal order, and at the conclusion of any appeal.<sup>81</sup> So a continuance or administrative closure is of little utility in this context. We recommend seeking termination and appealing from any other result. Applicants should expect that they may need to litigate other forms of relief; while it would often be administratively efficient to consider only one form of relief at a time, the immigration courts have a strong preference for simultaneous adjudication of all relief claims.<sup>82</sup>

### **C. Direct BIA Appeal of USCIS (d)(3) denial.**

The regulations at 8 C.F.R. § 212.17(b)(3) state that “[t]here is no appeal of a decision to deny a waiver.”<sup>83</sup> That sentence does not specify whether it applies to the § 212(d)(14) waiver or the § 212(d)(3)(A) waiver or both. It has been generally assumed that this regulation bars appeal of either waiver within USCIS.

That said, the BIA employed the regulations at 8 C.F.R. § 212.4(b) in the course of analyzing its authority under INA § 212(d)(3)(A) in *Khan*. The Board noted that § 212.4(b) was “outdated” (for instance, the waiver refers to Immigration Judges as “Special Inquiry Officers,” a term not used for decades), but it also held that “the substance of the regulations make clear that they actually apply to the current waiver at section 212(d)(3)(A)(ii) of the Act.”<sup>84</sup> To the extent that § 212.4(b) continues in effect as to U visa applicants, it provides a potential alternate route to

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<sup>79</sup> Of course, if the noncitizen has other possible relief which would be helped by a delay in the proceedings, that is a different matter.

<sup>80</sup> See Memorandum, David Venturella, ICE Acting Director to ICE Field Office Directors, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants* (Sept. 24, 2009) [https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/11005\\_1-hd-stay\\_requests\\_filed\\_by\\_u\\_vis\\_a\\_applicants.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_vis_a_applicants.pdf).

<sup>81</sup> INA § 101(a)(47)(B); 8 C.F.R. § 1003.39.

<sup>82</sup> Where the applicant has other relief, attorneys will need to assess the relative strengths and weaknesses of the possible claims, in order to determine which to pursue and in what manner. Failure to timely file applications and pursue relief may forfeit the opportunity to seek that relief later. 8 C.F.R. § 1003.31(c); *Matter of Interiano-Rosa*, 25 I&N Dec. 264, 266 (BIA 2010). That said, pursuing weak claims can tend to undermine stronger claims, and we see no benefit in this context to making losing relief applications simply for the sake of pursuing other relief.

<sup>83</sup> *Id.* § 212.17(b)(3); *Matter of Hranka*, 16 I&N Dec. at 492.

<sup>84</sup> *Khan*, 26 I. & N. Dec. at 802 n.6.

obtaining review. The regulatory provisions flow one after another in a series of disconnected sentences and clauses. The relevant portions are reproduced in whole below, and then discussed.

An application for the exercise of discretion under section 212(d)(3)(B) of the Act shall be submitted on the form designated by USCIS with the fee prescribed in 8 CFR 103.7(b)(1), and in accordance with the form instructions.... When the application is made because the applicant may be inadmissible due to the conviction of one or more crimes, the designation of each crime, the date and place of its commission and of the conviction thereof, and the sentence or other judgment of the court shall be stated in the application; in such a case the application shall be supplemented by the official record of each conviction, and any other documents relating to commutation of sentence, parole, probation, or pardon. If the application is made at the time of the applicant's arrival to the district director at a port of entry, the applicant shall establish that he was not aware of the ground of inadmissibility and that it could not have been ascertained by the exercise of reasonable diligence, and he shall be in possession of a passport and visa, if required, or have been granted a waiver thereof. The applicant shall be notified of the decision and **if the application is denied of the reasons therefor and of his right to appeal to the Board within 15 days after the mailing of the notification of decision** in accordance with the Provisions of part 3 of this chapter. If denied, the denial shall be without prejudice to renewal of the application in the course of proceedings before a special inquiry officer under sections 235 and 236 of the Act and this chapter. When an appeal may not be taken from a decision of a special inquiry officer excluding an alien but the alien has applied for the exercise of discretion under section 212(d)(3)(B) of the Act, the alien may appeal to the Board from a denial of such application in accordance with the provisions of § 236.5(b) of this chapter.<sup>85</sup>

In sum, the § 212.4 regulation: (a) specifies the form and fee for the waiver, (b) includes five rules for specific waiver contexts (communist party membership, health grounds, need for treatment, criminal inadmissibility, and applications at the Port of Entry); (c) provides that the applicant must be informed that she can appeal to the BIA within 15 days of any adverse decision; (d) permits renewal of the application in removal proceedings, and (e) specifies that even where a removal order cannot generally be appealed to the BIA, it may be appealed in this context.

Outside the U visa context, it is clear that applicants may appeal (d)(3) waiver denials to the BIA.<sup>86</sup> The BIA's Practice Manual explicitly acknowledges that the BIA maintains jurisdiction over § 212(d)(3) waivers.<sup>87</sup> The Board's general regulatory authority continues to specify that the Board has appellate jurisdiction over "[d]ecisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 1212 of this

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<sup>85</sup> 8 C.F.R. § 212.4(b).

<sup>86</sup> This is not unique to (d)(3) waiver denials. Appeals from USCIS to the BIA are permitted in various contexts, including from denials of visa petitions. 8 C.F.R. § 1003.1(b)(5).

<sup>87</sup> BIA Practice Manual, Chapter 1.4(a) (Aug. 8, 2014) ("Jurisdiction. – The Board generally has the authority to review appeals from the following: \*\*\* decisions of DHS regarding waivers of inadmissibility for nonimmigrants under § 212(d)(3)(A)(ii) of the Immigration and Nationality Act").

chapter.”<sup>88</sup> And the BIA has continued to hear appeals from nonimmigrant waiver denials generally, in cases unrelated to the U visa context.<sup>89</sup>

It is possible that the BIA would take the position that § 212.17(b)(3) (which purports to bar appeals of U visa waiver denials) ousts BIA jurisdiction over § 212(d)(3)(A) decisions relating to U visas. But there would be several problems with this conclusion. First, § 212.17(b)(3) is a DHS regulation, not a DOJ regulation; the BIA’s jurisdiction is determined by § 1003.1(b)(6) and § 1212.4(b), not anything in 8 C.F.R. § 212. The provisions in § 212.17 do not find a counterpart in 8 C.F.R. § 1212.17. It is highly doubtful that USCIS would have unilateral authority to constrict the jurisdiction of the BIA: “DHS has no authority to promulgate a regulation purporting to define the IJ’s jurisdiction,” and the same would logically be said as to BIA jurisdiction.<sup>90</sup> Second, an ambiguous sentence in § 212.17(b) would be insufficient to satisfy the standard for repeals by implication; intent to repeal must be “clear and manifest.”<sup>91</sup> In fact, the *L.D.G.* court applied these principles in its logic, finding that a partial repeal of (d)(3) authority would be disfavored under these principles.<sup>92</sup>

Thus, even if the text of the regulation at § 212.17(b) might appear to displace the general appeal rules for (d)(3) waivers, there are reasons to doubt that it actually displaces BIA appellate jurisdiction over (d)(3) waivers. The regulation at § 212.17(b)(1) does authorize USCIS to grant § 212(d)(3) waivers for U visa applicants, indicating agency awareness of the general nonimmigrant waiver provisions. But the appeal provision does not specifically displace the general appeal route for (d)(3) waivers, and there appears no sound reason why elimination of appeal would be appropriate. Rather, § 212.17(b) should be understood to channel waiver appeals to the BIA rather than the AAO.

Where USCIS has denied an applicant’s U visa application based on a waiver denial, applicants may wish to file an appeal of the denied U visa with the AAO so that the U visa application remains pending; or alternately to file a motion to reopen or reconsider the denial of the inadmissibility waiver or to refile the waiver with USCIS.<sup>93</sup> Either approach (assuming the (d)(3) waiver were granted before final U visa adjudication) would preserve the U visa request so that if the waiver is ultimately granted, a new U visa application (and a new law enforcement certification) should not be required.

The procedure for appealing from USCIS to the BIA is different than with appeals to the AAO or with appeals from removal orders. The AAO appeal form (Form I-290B) is not used. Rather, the applicant must use Form EOIR-29.<sup>94</sup> Second, and equally important, the EOIR form is **not mailed directly to the BIA** (as with a removal appeal). Rather, the form and fee are sent to the

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<sup>88</sup> 8 C.F.R. § 1003.1(b)(6).

<sup>89</sup> See e.g., In Re: James Edward Sellars, : A098 302 642 - HER, 2010 WL 304222, at \*1 (DCBABR Jan. 7, 2010) (Canadian certified financial planner with 30 year old drug conviction did not disclose conviction when attempting to enter, found inadmissible for fraud); In Re: Charlene Juanita Lum, : A089 833 851 - HER, 2009 WL 4899030, at \*1 (DCBABR Nov. 24, 2009) (narcotics possession, seeks permission to visit U.S. for medical purposes).

<sup>90</sup> *L.D.G.*, 744 F. 3d at 1039.

<sup>91</sup> *Rodriguez v. United States*, 480 U.S. 522, 524 (1987).

<sup>92</sup> 744 F. 3d at 1030 (citing *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009)).

<sup>93</sup> 8 C.F.R. § 212.17(b)(3).

<sup>94</sup> The form is available at <https://www.justice.gov/sites/default/files/pages/attachments/2015/07/24/eoir29.pdf>.

USCIS office which made the decision (e.g., the Vermont Service Center). The appeal fee is \$110.<sup>95</sup> Moreover, and perhaps most importantly to note, any briefs in the case must generally be filed with DHS at the same office as the Notice of Appeal (Form EOIR-29) and within the time frame specified by DHS.<sup>96</sup> Although regulations generally allow appeal briefs to be filed within 21 days,<sup>97</sup> in light of the 15 day period specified in § 212.4(b), it might be wise to file any briefs within 15 days. DHS has authority to extend this deadline, but many DHS offices would not respond with a prompt decision on the extension request. DHS forwards the record to the BIA for a decision. The BIA has authority to allow reply briefs if it wishes to do so.<sup>98</sup>

The BIA has yet to opine on the availability of BIA review over USCIS (d)(3) waiver denials in the U Visa context. Moreover, BIA appellate review over (d)(3) denials in other contexts has been very deferential.<sup>99</sup> But even if appellate review does not correct all injustices, NIJC believes that in the long term, appellate review may be expected to advance some level of consistency and fairness to the process, at least over the long term. It should be noted that even if the BIA has appellate power over USCIS waiver denials, the resulting BIA decisions would not be appealable to the Courts of Appeals through Petitions for Review, because those decisions would address the waiver, not a removal order.<sup>100</sup> Any federal appellate review would have to take place through district court litigation under the Administrative Procedure Act.<sup>101</sup>

One potential source of confusion is that an applicant might be pursuing an appeal from a USCIS waiver denial while simultaneously making a waiver request to the IJ or appealing an IJ waiver denial to the BIA. Detailed analysis of IJ jurisdiction over § 212(d)(3) waivers is found in the Appendix; and applicants should expect to need to seek federal review to vindicate those rights. By contrast, BIA direct appeal authority over § 212(d)(3) waivers is an open question at the Board, where the Board may well agree that it has jurisdiction as provided in its regulations.

## **V. STRATEGIC QUESTIONS FOR U VISA APPLICANTS WITH INADMISSIBILITY ISSUES IN REMOVAL PROCEEDINGS**

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

Under the *L.D.G.* approach, an applicant may seek a waiver either before USCIS or the IJ, and may choose to seek waivers before both simultaneously. 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,

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<sup>95</sup> See *id.* at 2.

<sup>96</sup> See 8 C.F.R. § 1003.3(c)(2).

<sup>97</sup> See 8 C.F.R. § 1003.3(c)(2). It is unlikely that the 15 day rule would apply to BIA appeals from an IJ removal order, but in light of the dearth of case law, applicants would be wise to ensure that appeals are filed with the BIA within 15 days.

<sup>98</sup> See 8 C.F.R. § 1003.3(c)(2).

<sup>99</sup> See cases listed *supra* at n.87.

<sup>100</sup> Cf. INA § 242(a) (allowing judicial review over final orders of removal).

<sup>101</sup> 5 U.S.C. § 552; see *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 445 (7th Cir. 2007); *Torres-Tristan v. Holder*, 656 F.3d 653, 663 n.10 (7th Cir. 2011).

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 is rather a *de novo* adjudication.<sup>102</sup>

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 if successful 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. If the IJ decides to deny the waiver, this would facilitate appeal in appropriate cases; clients may also choose whether to continue to pursue the U visa at this time.

- **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 government 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, the Seventh Circuit's approach contemplates that an applicant may obtain a waiver prior to filing a U visa application and should be cited if DHS argues otherwise. IJs proceeding under the Seventh Circuit approach have considered and granted section 212(d)(3)(A) waivers where a U visa was not on file with USCIS.

That said, it is extremely inadvisable to allow the U visa to be finally denied if the applicant intends to seek IJ review of a waiver denial. Once the U visa is denied, it would likely be necessary to obtain another law enforcement certification before refile the application, and obtaining another certification may be very difficult. It would also put the applicant further back in the queue, which could mean additional waiting time before an actual U visa grant. Moreover, while IJs *may* consider (d)(3) requests without a pending U visa application, the lack of a currently-filed application may also affect the IJ's decision in the case.

If it is possible to forestall a final U visa denial by USCIS, that is preferable. If the USCIS service center cannot be deterred from issuing a denial, the applicant may wish to consider appeal to the USCIS Administrative Appeals Office (AAO). Then, if the IJ grants a (d)(3) waiver while the appeal is pending, the AAO could presumably grant the U visa or remand to the Service Center in light of the waiver grant.

- **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 simply 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*

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<sup>102</sup> *L.D.G.*, 744 F.3d at 1032.



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@uscis.dhs.gov](mailto:HotlineFollowUpI918I914.VSC@uscis.dhs.gov) to advise the Center that he or she is mailing the documents and second, mail the documentation (including copies of receipt notices) requesting that the waiver grant evidence be consolidated with the pending U visa petition.*

- **Can USCIS second-guess the IJ's positive exercise of discretion by rejecting the waiver or by denying the U visa?**

It is not entirely clear how USCIS will treat U visa applications after IJ waiver grant. It is likely that (at least for the foreseeable future) USCIS will closely review any waiver grant; if USCIS finds that the waiver grant does not waive all applicable grounds of inadmissibility, USCIS would find itself authorized (and required) to decide itself whether to grant a waiver. An applicant can minimize these possibilities by ensuring that all possible inadmissibility grounds are listed on the Form I-192 being adjudicated by the IJ; and it is also advisable to ensure that DHS counsel states on the record that all inadmissibility grounds that apply are included in the waiver application.

It may be that USCIS claims the right to deny a U visa in the exercise of discretion even where the IJ has found a positive exercise of discretion warranted. Regulations do allow a waiver to be revoked at any time.<sup>103</sup> That said, the ability to revoke does not imply that it can be revoked for any reason or no reason. It is doubtful that USCIS could logically hold that a particular person merits a § 212(d)(3) waiver grant in the exercise of discretion but does not merit a U visa in the exercise of discretion. The law generally requires adjudicative consistency from federal agencies: “[a]n agency cannot merely flit serendipitously from case to case, like a bee buzzing from flower to flower, making up the rules as it goes along.”<sup>104</sup> Inconsistent decisions—even non-precedential decisions—are on very thin ice legally: “the prospect of [the Board] treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises ... concerns about arbitrary agency action.”<sup>105</sup>

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<sup>103</sup> 8 C.F.R. § 212.17(c).

<sup>104</sup> *Henry v. INS*, 74 F.3d 1, 6 (1st Cir. 1996).

<sup>105</sup> *Davila-Bardales v. INS*, 27 F.3d 1, 5 (1st Cir. 1994). For instance, in *Zhang v. Gonzales*, the Board denied asylum to a Chinese woman who feared forced sterilization; but granted asylum to her husband on precisely the same ground. 452 F.3d 167 (2d Cir. 2006). The Second Circuit reversed: “[a]lthough the BIA was aware of the former grant of relief ... it failed to address, much less explain, its apparent inconsistent treatment of the couple's seemingly identical future persecution claims.... A rational system of law would seem to require consistent treatment of such identical claims, or, at the very least, an explanation from the BIA for their seemingly inconsistent treatment.” *Zhang*, 452 F.3d at 173-74. Similarly, in *Wang v. Ashcroft*, the Agency granted asylum to a husband based on abortions suffered by his wife, but denied the wife's claim on credibility grounds. 341 F.3d 1015, 1019 n. 2 (9th Cir. 2003). The Agency persisted in defending that treatment in the Court of Appeals, and refused to take any steps to reconcile the two inconsistent decisions. *Wang*, 341 F.3d at 1019 n. 2. Commented the Court of Appeals, “[w]e wonder how any rational system could tolerate such inconsistent treatment.” *Id.*

If IJ were to decide that a person merits a positive exercise of discretion while USCIS said she did not, based on the same record, it would raise grave rationality concerns for the agency action.<sup>106</sup>

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

As explained above, where an IJ grants a 212(d)(3)(A) waiver, she should not enter a removal order. Termination without prejudice is the appropriate order. Termination ensures that the (d)(3) grant attains administrative finality (and can be appealed by DHS). If an IJ orders removal while simultaneously granting the 212(d)(3)(A) waiver, the applicant would be advised to consider appeal from that decision, arguing that the IJ was not required to enter an order of removal while granting a § 212(d)(3) waiver.

If an IJ is sympathetic but unconvinced that she can terminate the case, another option might be to seek reopening in the case. An IJ has clear regulatory authority to enter a stay of removal pending a decision on a motion to reopen.<sup>107</sup> An IJ who has granted a § 212(d)(3) waiver may be willing to stay removal pending a decision on reopening; and she might even be willing to defer adjudication of the motion to reopen until USCIS has made a decision on the U visa. This would have the effect of leaving in place a stay of removal, which would protect the noncitizen from removal and would also ensure IJ jurisdiction to terminate once the actual U visa is granted.

By regulation, an applicant can request a stay with ICE by filing Form I-246 and the \$155 application fee with the deportations section, attaching a copy of the waiver grant, proof that the U visa is pending, and any relevant documentation pertinent to the stay request. DHS has a written policy regarding the removal of U visa applicants, which remains in force.<sup>108</sup> That said, applicants in recent years have experienced great reluctance by ICE to grant a stay of removal to individuals awaiting U visa issuance. While the DHS stay route is simplest, there is little if any recourse if the stay is denied. We recommend seeking a stay from DHS only as an addition to other options, or if all other options have failed.

- **My client is detained; can she be released during the application process?**

Under the Seventh Circuit approach, an IJ considers a (d)(3) waiver as a relief application within removal proceedings. Individuals who are subject to mandatory detention<sup>109</sup> do not cease to be subject to mandatory detention because they are seeking a U visa waiver application. For those not subject to mandatory detention, the availability of a U visa remedy might influence an IJ or DHS to consider release or to consider release pursuant to a lower bond.<sup>110</sup>

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<sup>106</sup> The *L.D.G.* Court did state that “even if a waiver is granted USCIS retains the authority to grant or to deny the U Visa itself.” 744 F.3d at 1032. But this should not be understood as being in derogation of the broader legal principle that the federal government cannot be wildly inconsistent in its judgments without a sound reason for it.

<sup>107</sup> 8 C.F.R. § 1003.23(b)(v).

<sup>108</sup> See Memorandum, David Venturella, ICE Acting Director to ICE Field Office Directors, *Guidance: Adjudicating Stay Requests Filed by U Nonimmigrant Status (U-visa) Applicants* (Sept. 24, 2009)

[https://www.ice.gov/doclib/foia/dro\\_policy\\_memos/11005\\_1-hd-stay\\_requests\\_filed\\_by\\_u\\_vis\\_a\\_applicants.pdf](https://www.ice.gov/doclib/foia/dro_policy_memos/11005_1-hd-stay_requests_filed_by_u_vis_a_applicants.pdf)

<sup>109</sup> INA § 236(c).

<sup>110</sup> INA § 236(a); see *Matter of Guerra*, 24 I. & N. Dec. 37, 40 (BIA 2006)..

- If an IJ grants a (d)(3) waiver, the propriety of ongoing detention turns on what else the IJ orders. If the IJ terminates the proceedings without prejudice, and that order is not appealed (or if the appeal is dismissed), then DHS authority to detain is necessarily at an end. If the IJ enters a removal order in the case, then DHS detention authority is governed by post-order provisions.<sup>111</sup> If the IJ continues removal proceedings, then detention depends on the circuit. Several circuits find detention authority to be implicitly limited to detention which is reasonable; some circuits require additional procedural protections.<sup>112</sup> The intricacies of mandatory detention rules are beyond the scope of this practice advisory, but an applicant's strategy ought to be influenced by the applicable detention rules. **My client has already been ordered removed. Can I reopen proceedings in order to seek a (d)(3)(A) waiver before the IJ?**

If a noncitizen already has an outstanding removal order before seeking a U visa, the noncitizen might wish to ask an IJ to reopen proceedings. There are no clear regulations on point in this context. If the noncitizen is outside the normal 90 day reopening window, reopening would require that DHS join in the motion; that the IJ reopen *sua sponte*; or that the noncitizen has another statutory or regulatory basis to reopen.<sup>113</sup> In those cases, applicants should file their motions to reopen with the strongest evidence possible, both as to waiver eligibility and discretion.

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

NIJC does not recommend this course of action, at least until the law in this area becomes clarified and stable (and generally not even then). At this point, it is too possible that the law may shift or develop in unhelpful ways, and triggering removal proceedings always entails risks.

It is conceivable at some point that it will be in the interest of some clients to request initiation of removal proceedings in order to apply for a U visa waiver before the IJ. For this approach to make sense, it would require a case likely to be approved in immigration court but likely to be denied or delayed with USCIS, and a client willing to risk detention and deportation in order to get a prompt decision. It would also require local ICE officers willing to initiate removal proceedings for a noncitizen to seek immigration relief. Even if the law were clarified, this would be a high-risk strategy which NIJC would generally not recommend. If the U waiver has been denied, a direct appeal to the BIA is a better strategy, at least for the time being.

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<sup>111</sup> INA § 241(a); see *Zadvydas v. Davis*, 538 U.S. 678 (2001).

<sup>112</sup> Four circuits apply a broad test holding that detention is not authorized by statute if it is of unreasonable length. *Diop v. ICE/Homeland Sec.*, 656 F.3d 221, 233 (3d Cir. 2011); *Ly v. Hansen*, 351 F.3d 263, 267-68, 271 (6th Cir. 2003); *Sopo v. US Atty. Gen.*, 825 F.3d 1199 (11th Cir. 2016); *Reid v. Donelan*, 819 F.3d 486 (1st Cir. 2016). Two circuits (the Ninth and Second) impose a six-month bright-line test for determining when detention is unreasonable. *Rodriguez v. Robbins*, 804 F.3d 1060 (9th Cir. 2015), cert. granted *Jennings v. Rodriguez*, No. 15-1204 (June 20, 2016); *Lora v. Shanahan*, 804 F.3d 601, 614 (2d Cir. 2015). The Supreme Court has granted certiorari in *Jennings* and is expected to resolve these questions in the coming months.

<sup>113</sup> See INA § 240(c)(7); 8 C.F.R. § 1003.3; 8 C.F.R. § 1003.23.

## CONCLUSION

The U visa is still relatively young by legal standards. Practitioners representing U visa applicants will need to be familiar with the different possible approaches to these questions in order to effectively advocate on behalf of their clients. An appendix follows, which is designed to familiarize practitioners in circuits other than the Seventh with legal arguments supporting the argument that IJs have § 212(d)(3) waiver authority in the U visa context. NIJC would invite attorneys to reach out to NIJC for consultation regarding pending cases, particularly before and during any federal litigation.

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## APPENDIX:

### Unpacking the legal dispute over IJ jurisdiction over U visa waivers

The dispute over IJ jurisdiction over U visa waivers involves the interplay of multiple statutes, U visa regulations, § 212(d)(3) regulations, BIA case law, due process claims, and the general nature of IJ and BIA authority. This advisory unpacks those legal questions one-by-one.

#### **A. Whether a U Visa applicant can waive inadmissibility under INA § 212(d)(3)(A).**

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 text of the regulation provides:

USCIS, in its discretion, may grant the waiver based on section 212(d)(14) of the Act, if it determines that it is in the public or national interest to exercise discretion to waive the applicable ground(s) of inadmissibility.... In its discretion, USCIS may grant the waiver based on section 212(d)(3) of the Act, 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.<sup>114</sup>

In *Matter of Khan*, the Board’s discussion of (d)(3) suggested doubts that the (d)(3) waiver actually was broadly available in U visa cases. The BIA found “[t]he legislative intent as to the interplay between the waivers in section 212(d)(3)(A)(ii) and section 212(d)(14) ... unclear” and implied that (d)(3) might not properly be available in this context.<sup>115</sup> However, the Board did not find § 212.17 invalid. (Of course, the Board considers itself to lack authority to reject or overturn regulations.<sup>116</sup>)

The Seventh Circuit considered the question in depth in *L.D.G.* *L.D.G.* found that if § 212(d)(14) displaced the availability of (d)(3) as to U visas, it would effectuate a partial repeal of those provisions; repeals by implication have long been disfavored by courts.<sup>117</sup> The Seventh Circuit went on to consider whether this circumstance could meet the standard for repeals by implication, i.e., that intent to repeal must be “clear and manifest.”<sup>118</sup> The Seventh Circuit analyzed the two provisions, and found that the two standards could coexist without redundancy because they had different standards and exclusions. *Id.*<sup>119</sup> The Seventh Circuit therefore rejected the implied repeal argument, finding section 212(d)(3)(A) still available for U visa applicants.<sup>120</sup>

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<sup>114</sup> 8 C.F.R. § 212.17 (parallel citations omitted).

<sup>115</sup> *Khan*, 26 I. & N. Dec. at 801.

<sup>116</sup> *Matter of Fede*, 20 I&N Dec. 35, 35-36 (BIA 1989).

<sup>117</sup> 744 F. 3d at 1030 (citing *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009)).

<sup>118</sup> *Rodriguez v. United States*, 480 U.S. 522, 524 (1987).

<sup>119</sup> The statute at INA § 212(d)(14) grants the Secretary the discretionary power to waive grounds of inadmissibility found anywhere in the statute, except paragraph (a)(3)(E). This is more expansive than INA § 212(d)(3)(A), which excludes authority to grant waivers for aliens inadmissible under INA § 212(a)(3)(A)(i)(I), (a)(3)(A)(ii), (a)(3)(A)(iii), (a)(3)(C), and (a)(3)(E).

<sup>120</sup> *L.D.G.*, 744 F.3d at 1030-31.

In sum, there are strong arguments that § 212(d)(3) is available for U visa applicants. The regulations say so; statutory construction principles support that conclusion; and nothing in *Khan* actually holds to the contrary.

**B. Whether INA § 212(d)(3)(A)’s grant of authority to the “Attorney General” was displaced by the creation of the Department of Homeland Security.**

The statute grants authority to the “Attorney General” to grant § 212(d)(3)(A) waivers. This might seem like a clear delegation of authority, but various functions previously under the authority of the Attorney General were transferred to DHS with the passage of the Homeland Security Act, even where the statute still refers to the Attorney General.<sup>121</sup> In INA § 212(d)(14), Congress was explicit in shifting authority from the Attorney General to the Secretary for Homeland Security.<sup>122</sup> However, the statutory text at INA § 212(d)(3)(A) was never altered to take away Attorney General authority. Indeed, Congress has amended INA § 212(d)(3) several times *since* the U visa was introduced and *since* the 2003 reorganization of the immigration system,<sup>123</sup> and yet Congress chose to maintain the Attorney General’s statutory authority to decide these nonimmigrant inadmissibility waivers. In other contexts, when Congress has specifically granted DHS authority in one part of the statute, but not in another, courts have applied the plain text of the statute.<sup>124</sup> The Seventh Circuit’s position as to (d)(3) waivers is certainly most consistent with the plain statutory text.<sup>125</sup>

Neither the Third Circuit nor the BIA held to the contrary on this point. In fact, while the BIA has found IJ authority limited, it assumed that the Attorney General might continue to have broad (d)(3) authority: “even if the Attorney General has this waiver authority regarding U visas, we cannot conclude that such authority extends to Immigration Judges.”<sup>126</sup> The Board’s assumption means, in effect, that Attorney General has authority to grant (d)(3) waivers, but that no mechanism exists for him to exercise that authority.

**C. Whether the INA includes immigration judges when it employs the term “Attorney General.”**

Since 1952, the term “Attorney General” has included various entities, including the Immigration Courts (formerly known as Special Adjudications Officers), the BIA, and the Attorney General.<sup>127</sup> When Congress created DHS, it mandated the continued application of the historical

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<sup>121</sup> Homeland Security Act of 2002, Pub.L. No. 107–296, §§ 471, 1502, 116 Stat. 2135, 2205, 2308 (codified at 6 U.S.C. §§ 291, 542).

<sup>122</sup> The Violence Against Women and Department of Justice Reauthorization Act of 2005, shifted adjudicatory authority for waivers under INA § 212(d)(14)—and INA § 212(d)(13), applicable to T visas for victims of human trafficking—from the Attorney General to the Secretary of Homeland Security. Pub. L. No. 109-162, § 802(b), 119 Stat. 2960, 3054.

<sup>123</sup> See Making Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. No. 109–13, 119 Stat 231 (2005) (renumbering and moving the § 212(d)(3)(A) waiver).

<sup>124</sup> See *Nijjar v. Holder*, 689 F. 3d 1077, 1083 (9th Cir. 2012).

<sup>125</sup> 744 F.3d at 1040.

<sup>126</sup> 26 I&N Dec. at 801.

<sup>127</sup> See *In re H-N-*, 22 I&N Dec. 1039, 1043 (1999) (noting that “Attorney General” includes the Immigration Courts).

understanding by providing that the pre-2002 relation between IJs and the “Attorney General” remains in place:

The Attorney General shall have such authorities and functions under this chapter and all other laws relating to the immigration and naturalization of aliens as were exercised by the Executive Office for Immigration Review [(“EOIR”)], or by the Attorney General with respect to the [EOIR], on the day before the effective date of the Immigration Reform, Accountability and Security Enhancement Act of 2002.<sup>128</sup>

Thus, Congress ratified and required the use of the original definition of “Attorney General” (including IJs), unless otherwise provided in statute. Under a plain reading of the statute, therefore, immigration judges, pursuant to the Attorney General’s delegation, have authority to consider § 212(d)(3)(A)(ii) waivers for noncitizens in removal proceedings.<sup>129</sup>

The Seventh Circuit understands the regulations to be consistent with the Homeland Security Act by generally conferring on IJs the authority of the Attorney General, unless otherwise specified. It found that 8 C.F.R. § 1003.10(a) “sounds like a declaration that IJs may exercise all of the Attorney General’s powers ‘in the cases that come before them’, unless some other regulation limits that general delegation.”<sup>130</sup> Finding no regulation eliminating jurisdiction in the U visa context (and noting that neither the Board nor the Third Circuit had cited these general regulations), it found IJ jurisdiction to continue.

#### **D. Whether INA § 212(d)(3)(A) waiver authority is limited to applicants for admission.**

The Third Circuit, not disputing that Attorney General authority applies to (d)(3) waivers and includes IJs, nevertheless found that § 212(d)(3)(A) authority was limited to individuals who are “seeking admission” as defined in INA § 101(a)(13)(A).<sup>131</sup> But longstanding agency authority treats a change of status as equivalent to an admission, much as adjustment of status: “[t]he applicant’s conversion to nonimmigrant status ... must be equated to an inspection and admission into the United States as a nonimmigrant.”<sup>132</sup> Indeed, if U visa applicants are not “seeking admission,” then the inadmissibility grounds at INA § 212—which render noncitizens “ineligible to be admitted”—would logically seem not to apply at all.

The Third Circuit’s analysis would also imply that the DHS regulations allowing (d)(3) waivers are invalid, at least to anyone not at a port of entry. If § 212(d)(3)(A) is available only for those seeking admission, DHS regulations which allow (d)(3) waivers for all U visa applicants would be at least partially ultra vires.

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<sup>128</sup> INA § 103(g)(1); see also, 6 U.S.C. § 557.

<sup>129</sup> See *L.D.G.*, 744 F.3d at 1026.

<sup>130</sup> *Baez-Sanchez v. Sessions*, 872 F.3d 854, 855 (7th Cir. 2017); see 8 C.F.R. § 1003.10(a) (“[i]mmigration judges shall act as the Attorney General’s delegates in the cases that come before them.”)

<sup>131</sup> . *Sunday v. Att’y. Gen’l.*, 832 F.3d 211, 214 (3d Cir. 2016).

<sup>132</sup> *Matter of Menendez*, 12 I. & N. Dec. 291, 292 (BIA 1967); see also *Matter of Lee*, 11 I. & N. Dec. 96, 96 (BIA 1965) (“The change of status is the equivalent of admission..., there being no necessary distinction between being granted that status at the border or being granted it within the United States.”); cf. *Matter of Agour*, 26 I. & N. Dec. 566, 579–80 (BIA 2015) (finding that “adjustment of status constitutes an admission” because § 101(a)(13)(A) “does not provide the exclusive definition for an admission.”).

Perhaps this is why the BIA did not adopt this portion of the Third Circuit’s reasoning (though it did “find support” for its conclusions in the Third Circuit opinion).<sup>133</sup> Unlike the Third Circuit, the BIA did not hold that § 212(d)(3)(A) waivers are *per se* only available for those seeking admission; rather, it found that *its* regulatory authority as to U visa applicants did not extend beyond those apprehended while seeking admission.<sup>134</sup>

**E. Whether the regulations forbid immigration judges from exercising the authority of the Attorney General over U visa (d)(3) waivers.**

The ultimate holding of *Matter of Khan* is that *even if* the (d)(3) waiver is available for U visa applicants and *even if* the Attorney General can grant (d)(3) waivers in this context, “the regulations do not give Immigration Judges authority to grant a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the Act to a petitioner for U nonimmigrant status who is in the United States.”<sup>135</sup>

There are multiple problems with this type of analysis. First, the § 212(d)(3) regulations were promulgated many years before the U visa statute was enacted, at a time when nonimmigrant waivers could not possibly be sought within the U.S. The Board itself characterized the regulations as outdated.<sup>136</sup> So the Board’s holding boils down to interpreting decades-old regulations to oust the statutory authority of the Attorney General over § 212(d)(3) waiver requests. Courts have found this unreasonable in other contexts.<sup>137</sup>

Second, if the Board was going to rely on regulations alone to preclude IJ authority, it ought at least to have analyzed regulations generally granting the Attorney General’s authority to IJs.<sup>138</sup> The Board neither cited nor discussed those regulations, nor the case law applying those regulations. It privileged one ambiguous and outdated regulation over that broad grant of authority, without explaining or justifying that choice. This is particularly odd since the Board’s reading of the regulations would mean that the Attorney General would have no practical way of exercising his authority.

Finally, the regulations simply do not say what the Board claims. They do not preclude waiver applications inside the U.S.; they merely provide for a particular process “[i]f the application is made at the time of the applicant’s arrival to the district director at a port of entry.”<sup>139</sup> This text might, if read in a vacuum, imply that the waiver is not available except in that context; but the regulations need not be read in a vacuum. The rest of the regulation applies to particular circumstances (such as individuals entering the U.S. for medical treatment) without implying that the waiver is only available in those circumstances; there is no reason to read the language regarding seeking the waiver at time of arrival to be any different. The regulatory language

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<sup>133</sup> 26 I&N Dec. at 801.

<sup>134</sup> 26 I&N Dec. at 801.

<sup>135</sup> 26 I&N Dec. at 801.

<sup>136</sup> *Khan*, 26 I&N Dec. at 802 n.6.

<sup>137</sup> *Musunuru v. Lynch*, 831 F.3d 880, 889 (7th Cir. 2016).

<sup>138</sup> *Baez-Sanchez v. Sessions*, 872 F.3d 854, 855 (7th Cir. 2017); see 8 C.F.R. § 1003.10(a) (“[i]mmigration judges shall act as the Attorney General’s delegates in the cases that come before them.”)

<sup>139</sup> 8 C.F.R. § 212.4(b)



certainly is not clear in precluding the exercise of IJ authority; and cannot displace other regulations allowing IJs to exercise the Attorney General’s authority.

#### **F. Whether the BIA can claim *Chevron* deference for *Matter of Khan*.**

Under *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*,<sup>140</sup> courts generally defer to an agency’s interpretation of an ambiguous statute. The Board’s decision in *Khan* invoked *Chevron* deference.<sup>141</sup> But *Chevron* deference is unlikely to apply to *Khan*.

First, *Khan* did not actually purport to interpret statutes. The Board assumed that § 212(d)(3) waivers were available in the U visa context, and assumed also that the Attorney General might maintain authority to grant (d)(3) waivers to U visa applicants.<sup>142</sup> However, the Board went on to reason that the regulations did not authorize it or IJs to grant such waivers.<sup>143</sup> Whatever the merits of this analysis, it is not a statutory analysis: it is a regulatory analysis. Therefore, *Chevron* does not apply to *Khan*.

Second, to the extent that *Chevron* deference could be invoked for § 212.4(b), the regulations predate by decades the relevant statutory interplay. That regulation has been unchanged since the mid-1960’s, when port officials, benefit adjudicators, and immigration judges were all part of the Immigration and Naturalization Service (“INS”), within the Department of Justice.<sup>144</sup> These regulations do not reflect changes in nonimmigrant statutes which now permit some nonimmigrant visas to be sought within the U.S. by individuals not in current lawful status. Congress now authorizes certain classes of noncitizens to change status within the U.S. U Visa applicants are one significant category.<sup>145</sup> But they are not alone; other nonimmigrant visas may also be obtained within the U.S. by noncitizens lacking legal status.<sup>146</sup> It makes little sense to read the statute as barring nonimmigrant waivers to noncitizens present in the U.S.; but it makes even less sense to impute that intent via a regulation like § 212.4(b), which indisputably has not been “updated” to reflect the current statute.<sup>147</sup> In analogous situations, courts have declined to defer to outdated regulations that construe a later-enacted statute.<sup>148</sup>

#### **G. Whether the BIA can claim *Auer* deference for *Matter of Khan*.**

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<sup>140</sup> 467 U.S. 837, 843 (1984).

<sup>141</sup> 26 I&N Dec. at 805.

<sup>142</sup> 26 I&N Dec. at 801.

<sup>143</sup> 26 I&N Dec. at 801.

<sup>144</sup> See 29 Fed. Reg. 15252 (Nov. 13, 1964). For example, 8 C.F.R. § 212.4(b) refers to renewing the waiver application before a “special inquiry officer” a position that was replaced with “Immigration Judge” in 1973. See *Immigration and Naturalization Service Definitions: Immigration Judge*, 38 Fed. Reg. 8590, 8590 (Apr. 4, 1973) (codified as amended at 8 C.F.R. § 1.1 (2005) (amending part 1 of chapter 1 of the title 8 of the Code of Federal Regulations “to provide that the terms ‘immigration judge’ and ‘special inquiry officer’ may be used interchangeably”).

<sup>145</sup> INA § 214(p).

<sup>146</sup> See INA § 101(a)(15)(T)(i)(II) (victims of human trafficking “present in” the U.S.); INA § 214(q) (family members of permanent residents). Indeed, trafficking victims may *only* seek T visa status within the United States. 9 Foreign Affairs Manual 402.6-5(E)(1).

<sup>147</sup> 26 I&N Dec. at 802 n.6.

<sup>148</sup> See *Musunuru v. Lynch*, 831 F. 3d 880, 889 (7th Cir. 2016) (finding regulations unreasonable for failing “to account for the change ... worked upon the INA” by later statutory amendments).

The government also argues that *Khan* should receive *Auer* deference as an agency interpretation of regulations.<sup>149</sup> (The difference between *Chevron* deference and *Auer* deference is that *Chevron* deference involves an agency construction of an ambiguous statute, while *Auer* involves agency interpretation of an ambiguous regulation.) To the extent that the longstanding (d)(3) regulations are ambiguous, the agency argues that the Board’s view of those regulations receives deference. Under *Auer*, an agency interpretation of its own regulations is controlling unless “plainly erroneous or inconsistent with the regulation.”<sup>150</sup>

There are strong arguments that *Auer* does not apply to *Khan* at all. At least some of the pertinent regulations are not promulgated by the Department of Justice. *Auer* gives deference to an agency’s construction of its own regulations; not deference to construction of another agency’s regulations.<sup>151</sup> It should also be noted that *Auer* is controversial, with several Supreme Court justices on record as arguing that *Auer* should be entirely abrogated.<sup>152</sup>

At any rate, *Khan* would fall even under *Auer*’s deferential standard. It is undisputed that 8 C.F.R. § 1212.4(b) has not been “updated” to reflect the current statute.<sup>153</sup> In analogous situations where agency rules are based on “inertia,” courts have declined to defer to outdated regulations as maintaining the status quo.<sup>154</sup> Moreover, the Board’s putative “efficiency” concerns are misplaced or flatly wrong.<sup>155</sup> A waiver decision would function as an effective proxy to determine what to do with the case. The Board allows a case to be continued to await U visa adjudication.<sup>156</sup> But if the IJ considered and denied a waiver, that would be reasonable cause to refuse to continue the case to allow U visa adjudication. By contrast, if a waiver were granted, the IJ would have sound reasons to terminate or continue the case. Moreover, the Board’s process is not very efficient, at least as to detained noncitizens. It takes USCIS many years to adjudicate U visa cases; if proceedings are continued for years, this imposes harm on the noncitizen and their family, as well as substantial detention costs on DHS.

## **H. Policy and fairness considerations.**

The U visa program protects immigrants “who are victims of [qualifying] crimes,” because it is fair to them and best for society.<sup>157</sup> The statute seeks to ensure that “battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States.”<sup>158</sup> Immigrant victims of crime are particularly vulnerable to retaliatory immigration prosecution (often spurred via anonymous tips), which have historically reduced willingness to cooperate in

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<sup>149</sup> *Auer v. Robbins*, 519 U. S. 452, 461 (1997).

<sup>150</sup> *Auer*, 519 U. S. at 461.

<sup>151</sup> *L.D.G.*, 744 F. 3d at 1028-29.

<sup>152</sup> *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608, 195 L. Ed. 2d 241 (2016) (Thomas, J., dissenting from denial of certiorari) (“the doctrine is on its last gasp”).

<sup>153</sup> 26 I&N Dec. at 802 n.6.

<sup>154</sup> See *Musunuru v. Lynch*, 831 F. 3d 880, 889 (7th Cir. 2016) (finding regulations unreasonable for failing “to account for the change ... worked upon the INA” by later statutory amendments).

<sup>155</sup> See *Khan*, 26 I. & N. Dec. at 804

<sup>156</sup> *Matter of Sanchez Sosa*, 25 I&N Dec. 807 (BIA 2012).

<sup>157</sup> *United States v. Cisneros-Rodriguez*, 813 F.3d 748, 762 (9th Cir. 2015) (citation omitted).

<sup>158</sup> See 146 Cong. Record S10185 (2000) (statement of Sen. Patrick Leahy).

criminal prosecutions.<sup>159</sup> Congress granted U visa protection not only to survivors of domestic violence, but to immigrant victims of certain other offenses, who cooperate with the prosecution of their attackers. Congress meant to encourage cooperation with prosecution: when immigrant victims of crime cooperate with law enforcement, the community becomes safer for all.<sup>160</sup>

*Khan* does not even acknowledge this statutory purpose. *Khan* gives no consideration to the underlying policy behind enactment of the U visa nor how the Board's interpretation would affect that policy. To be reasonable, courts require that "the BIA's approach must be tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system."<sup>161</sup> The Board was obliged to consider this context in order for its analysis to be reasonable, and it did not do so.

Moreover, as a general rule, Congress affords substantial procedural protections to noncitizens facing removal.<sup>162</sup> Individuals subject to removal proceedings are afforded an impartial adjudicator, the right to present evidence and cross-examine witnesses and the opportunity to present arguments through counsel.<sup>163</sup> IJ consideration of § 212(d)(3) waivers would also facilitate the reviewability of agency decisions related to the U visa,<sup>164</sup> since IJ and BIA decisions are reviewed for legal and constitutional error.<sup>165</sup> As interpreted by the Board, Congress would give process and appeal rights to all sorts of noncitizens, but not to victims of crime. This runs contrary to the purpose of the U visa statute, as well as § 240(b)(4)(B).<sup>166</sup> This is at least anomalous.

The Seventh Circuit's approach would impose only relatively modest burdens on IJs. Immigration Courts frequently consider the kinds of factors relevant to § 212(d)(3) waivers, including the gravity of the offense, the question of the rehabilitation of the noncitizen, and the public interest.<sup>167</sup> Noncitizens seeking U visas in proceedings are by definition already in removal proceedings; IJs are already considering other relief applications, such as applications

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<sup>159</sup> See Deanna Kwong, *Removing Barriers for Battered Immigrant Women: A Comparison of Immigrant Protections under VAWA I & II*, 17 Berkeley J. of Gender, Law and Just. 137, 150 (2002).

<sup>160</sup> *New Classifications for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53,014, 53,018 (Sept. 17, 2007) ("Congress wanted to encourage aliens who are victims of criminal activity to report the criminal activity to law enforcement and fully participate in the investigation and prosecution of the perpetrators of such criminal activity."); Stacey Ivie & Natalie Nanasi, *The U Visa: An Effective Resource for Law Enforcement*, FBI L. Enforcement Bull. 15 (Oct. 2009) ("fear of deportation can cause immigrant communities to cut themselves off from police and not offer information about criminal activity, even when victimized. Consequently, predators remain on the street, emboldened because they know they can strike with impunity. As a result, societies face increased crime, including serious offenses, and the perpetrators victimize and endanger everyone, not just illegal immigrants.").

<sup>161</sup> *Judulang v. Holder*, 565 U.S. 42, 55 (2011).

<sup>162</sup> *Rehman v. Gonzales*, 441 F.3d 506, 508 (7th Cir. 2006).

<sup>163</sup> INA § 240(b)(4)(B).

<sup>164</sup> *INS v. St. Cyr*, 533 U.S. 289, 298 (2001); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995).

<sup>165</sup> INA § 242(a)(2)(D); see also *Kucana*, 558 U.S. at 243-53.

<sup>166</sup> Cf. *Hernandez v. Ashcroft*, 345 F.3d 824, 840 (9th Cir. 2003) (noting "the general rule of construction that when the legislature enacts an ameliorative rule designed to forestall harsh results, the rule will be interpreted and applied in an ameliorative fashion.").

<sup>167</sup> See e.g., *Matter of C-V-T-*, 22 I & N Dec. 7, 11-12 (BIA 1998) ("a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion").

for withholding of removal (which can be legally and factually complicated). All of this militates in favor of the Seventh Circuit's approach.

A challenge to *Khan* requires a litigant to address several questions, relating to statutes, regulations, and case law. But there are strong arguments against the Board's approach. Please reach out to NIJC if you are considering litigation on this topic.

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