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November 16, 2007

Department of Homeland Security
111 Massachusetts Avenue, NW, 3rd Floor
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By email: rfs.regs@dhs.gov

RE: DHS Docket No. USCIS-2006-0069

Dear Sir/Madam:

The American Immigration Lawyers Association (AILA) hereby submits comments to the Department of Homeland Security's (DHS) Interim Rule for New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status.

We appreciate the opportunity to comment on the interim rule and believe that we are particularly well qualified to do so. AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing and teaching in the field of immigration and nationality law. Our mission includes the advancement of law pertaining to immigration and naturalization, and the facilitation of justice in the field. AILA members regularly assist foreign nationals and their employers in the process of applying for immigration status, and are familiar with the ever-changing complexities of immigration.

The interim rule subjects applicants for U nonimmigrant status to substantial financial costs, contains unreasonably brief timeframes for filing, has an unpredictable and overly burdensome certification process, has provisions that may work to increase the length of detention for those eligible for U relief who are under final orders of removal, and appears to prevent individuals who have been granted interim U relief who have aged-out from retaining their U status. AILA urges USCIS to consider the legislative purpose behind U nonimmigrant status – "to strengthen the ability of law enforcement to

detect, investigate and prosecute cases…while offering protection to victims"[1] – when considering revisions to the interim rule.

A Fee Waiver Should Be Available For Form I-192

In recognition of the humanitarian purpose behind U nonimmigrant status, and consistent with the legislative intent to assist immigrant crime victims,[2] USCIS determined that it would not charge a fee for filing Form I-918.[3] USCIS also recognizes that anecdotal evidence indicates that applicants under this program are generally deserving of a fee waiver.[4]

While AILA appreciates USCIS's decision to issue a blanket fee waiver for Form I-918, it is deeply concerned about fees for Form I-192. Under the interim rule, no fee waiver is available for Form I-192. AILA encourages USCIS to either eliminate the fee for Form I-192 for principal and derivative U applicants, or to allow a fee waiver for Form I-192 when submitted in connection with an application for U nonimmigrant status.

In the preamble to the regulations, USCIS recognizes that "[t]his program involves the personal well-being of a few applicants and petitioners, and the decision to waive the petition fee reflects the humanitarian purposes of the authorizing statutes." In keeping with this, the interim rule addresses a waiver for all fees associated with U nonimmigrant status applications – all except Form I-192. The fee for this program cannot be considered truly "waived" if a fee is required for Form I-192. This is particularly true for U visa applicants who must first be admissible in a nonimmigrant status.[5] If a petitioner is not admissible, s/he is required to file Form I-192 as initial evidence of eligibility for this status.[6] Therefore, Form I-192 is clearly recognized to be an integral part of an application.

Moreover, the filing fee associated with Form I-192 is $545, no slight burden.[7] According to non-profit members of AILA who work with immigrant crime victims, the vast majority of their clients granted interim relief are inadmissible on at least one ground, and would, thus, be required to file Form I-192 in connection with their application for U nonimmigrant status. This substantial fee is not limited to the principal applicant, but applies to all derivatives who fail to meet admissibility requirements and

[1] 72 Fed. Reg. 53014 (Sept. 17, 2007).
[2] *See* 72 Fed. Reg. 53031 (Sept. 17, 2007).
[3] *Id.*
[4] *Id.*
[5] *See* INA § 212(a).
[6] *See* New 8 C.F.R. § 214.14(c)(2)(iv). Even a process where the USCIS would conduct a review of a U visa application to determine whether a waiver is necessary before requiring submission of an I-192 waiver application, though a welcome accommodation, would merely delay having to pay this fee and does not eliminate it.
[7] *See* 72 Fed. Reg. 29851 (May 30, 2007). (Noting that under the revised fee schedule effective July 30, 2007, Form I-192 is not eligible for a fee waiver under any circumstances.)

must also file a separate Form I-192 and pay $545 filing fees. For a family of four this would add up to $2,180.

Applicants for U nonimmigrant status are crime victims and are generally the poorest of the poor. Many do not have the means to pay the substantial fees associated with Form I-192. Nor do the non-profit agencies that assist many of these crime victims have the resources to pay this fee for their clients. As a result, requiring this fee will likely deter victims of crimes from coming forward and cooperating with law enforcement, when the likely result is they will be ineligible for the protection afforded by U nonimmigrant status.

Also, since the rule requires that individuals granted "deferred action" under the interim program apply for U nonimmigrant status within one-hundred and eighty days of October 17, 2007, the non-waivable I-192 fees threaten their ability to retain legal status.

We hope that USCIS's decision to state that it is waiving most fees but at the same time imposing a significant non-waivable fee for Form I-192 is simply a case of an oversight by the agency. Nevertheless, whether it is intended or not, this fee will block thousands of individuals from obtaining U nonimmigrant status. This would undermine Congress' dual purpose of assisting law enforcement officials in the investigation and prosecution of crimes and assisting immigrant crime victims.

AILA is also concerned about other fees connected with the U visa. For example, a U visa applicant who is in removal proceedings is required to file Form I-246, "Application for Stay of Removal." The fee associated with this form is $155 and is not waivable. In order to obtain a U visa for re-entry to the United States, an applicant must have a valid, unexpired passport. If an applicant is not able to obtain a passport from his or her country of origin, then he or she must file Form I-193, "Application for Waiver of Passport and/or Visa" with the accompanying non-waivable fee of $545. An example of a person who would need to submit a Form I-193 would be a trafficking victim whose passport was taken by her trafficker and who needs to travel outside of the United States due to an unforeseen emergency. Moreover, an applicant who would need to extend U nonimmigrant status, such as an applicant granted interim relief over four years ago and filing the I-918 now, would be required to file a Form I-539 "Application to Extend/Change Nonimmigrant Status" with the accompanying $300 fee. Again, this fee is not waivable.

Under the interim rule, we are concerned that an overwhelming majority of individuals eligible for U nonimmigrant status will be unable to pursue this relief due to the prohibitively expensive fees of Form I-192. Each of these fees would be a substantial burden for U visa applicants, and would present a barrier to obtaining this form of immigration relief. Moreover, paying a fee in connection with obtaining U nonimmigrant status contradicts the stated humanitarian purpose of U nonimmigrant status. It is imperative that USCIS revise the interim rule so that no fee is associated with filing Form I-192, or, in the alternative, that a fee waiver be made available for Forms I-192, I-193, I-246, and I-539.

The Interim Rule's Requirement That Aliens With Interim Relief File Form I-918 Requesting U Visa Status Within 180 Days Of The Effective Date Of This Rule Is Unreasonable And Burdensome

The 180-day timeframe for individuals with interim relief to apply with Form I-918 does not provide adequate time for applicants to submit a complete application. We recommend a two year filing deadline. In recognition of the particular constraints upon individuals who have already shown *prima facie* eligibility for interim U nonimmigrant status, a two year deadline is reasonable for this vulnerable and financially disadvantaged population of prospective petitioners.

The interim rule states "USCIS believes that 180 days provides an interim relief recipient a sufficient period of time within which to file and perfect a U nonimmigrant petition, taking into account the time it may take for individuals to learn of this rule and put together a complete package requesting U nonimmigrant status."[8] There is no compelling justification provided for such a short filing period, particularly in view of the fact that seven years have elapsed since the creation of the U nonimmigrant category. During that period thousands of applicants have received interim relief and now they will all have to file anew within a 180-day period in order to maintain status.

We respectfully disagree with the USCIS's assessment of this timeframe as adequate. One-hundred-and-eighty days is not a sufficient period of time for petitioners to learn of the new rule, understand the process, retain legal counsel where desired and needed, prepare and submit a complete and fully documented application and gather the necessary fees, where required, or prepare and submit a request for waiver of same.

The 180-day timeframe does not provide sufficient time to disseminate information about the new rule to eligible petitioners and allow them enough time to compile and submit a complete and strong I-918 petition. The present timeframe does not allow enough time for prospective petitioners to learn of the new regulation and requirements and file Form I-918 within the prescribed period. Currently, USCIS notifies the general public of new regulations through its internet website, the Federal Register and through the general media. Although these methods are valuable, they are in no way an exhaustive or entirely effective means of efficiently notifying the mass public of new regulations and requirements for filing the associated petitions. Despite these efforts, it takes significant time for information to be disseminated to the public and for them to become fully and accurately aware of immigration regulations. As such, the fact that interim relief petitioners must file within one-hundred and eighty days from the effective date of the regulation is unreasonable, since it may take months for those affected to learn of the new regulations.

Also, according to the interim rule, aliens previously granted interim relief must file the Form I-918 together with all necessary supporting documentation to prove eligibility for

[8] See 72 Fed. Reg. 53021 (September 17, 2007).

U nonimmigrant status.[9] This includes Form I-918, Supplement B, U Nonimmigrant Status Certification, and other additional documentation necessary to establish eligibility for U nonimmigrant status. Should an applicant fail to provide USCIS with the necessary supporting documentation, USCIS may either deny the petition or issue an RFE. The proposed timeframe does not provide interim relief petitioners with enough time to gather the evidence necessary to submit a complete and strong application. The burden to establish eligibility for U nonimmigrant status is on the petitioner, and since it is within USCIS's discretion to deny the petition if it is deemed incomplete, it is imperative that petitioners have adequate time to gather sufficient evidence to support their petitions.[10]

The pressure of the 180-day timeframe may result in petitioners submitting incomplete applications simply to meet the deadline and preserve their interim relief, and ultimately risk receiving a denial or alternatively, resulting in additional work to the Service in issuing RFEs to address inadequately filed applications. This result would serve neither the petitioners nor the Service nor the authorities in need of the assistance of the petitioners in prosecuting the perpetrators of various crimes against society.

Furthermore, the rule's 180-day timeframe does not grant petitioners adequate time to seek and find legal representation to aid them with the immigration process. Many eligible petitioners find the USCIS forms and procedures daunting and complicated, and as such, they require competent legal counsel to represent them. The rule's 180-day timeframe provides the petitioners with such limited time that petitioners may become discouraged from seeking and obtaining legal counsel out of fear of losing valuable time within which to file the necessary paperwork. Fundamental fairness dictates that the rule, minimally, provides petitioners with sufficient time to seek out and retain competent legal counsel.

Moreover, attorneys and agencies that provide immigration services to the affected population need more time to prepare and compile strong and complete applications for their clients who are eligible for relief under this rule. Seven years' worth of applications will have to be submitted within 180 days. Many individuals eligible to apply for U nonimmigrant status have or will, by necessity, avail themselves of *pro bono* legal representation.

It is foreseeable that non-profit organizations which have represented petitioners in obtaining interim relief will bear the majority of the workload providing the necessary *pro bono* services to eligible individuals in applying for U nonimmigrant status. These organizations need adequate time to prepare and compile complete applications for submission to USCIS. The rule's timeframe does not provide these organizations with sufficient time to obtain all of the necessary supporting documentation and prepare the complete submissions for their clients. These *pro bono* organizations will be inundated with petitioners, including both those with interim relief status and totally new petitioners. These organizations need adequate time to process applications or they will

[9] *See* 8 C.F.R. § 214.14(c)(1).
[10] *See* 8 C.F.R. §§ 214.14(c)(4); (f)(5).

be forced to turn away eligible petitioners that they would have otherwise represented simply due to the limited time available to satisfactorily prepare the petitions. Given the burden that will be placed on these organizations, as well as attorneys from the private bar accepting some of these cases, a longer, more reasonable timeframe for submission – at least two years – will provide the time necessary to adequately represent this population.

The 180-day timeframe for filing can impose significant burdens on those aliens who must submit Form I-192 waiver applications, and who must pay the substantial filing fee. It is recognized that a significant proportion of those aliens potentially eligible for U visa classification suffer severe economic hardship. Even if the base filing fee is waived, for a great number, securing the Form I-192 filing fee will be daunting, if not impossible, and particularly so in a brief one-hundred and eighty day period.

While AILA recognizes that USCIS may wish to impose a deadline for submission of the applications, we respectfully request that such timeframe be fair, reasonable and adequate to enable eligible petitioners and their representatives to prepare and submit proper, complete and approvable petitions. The 180-day timeframe does not meet these standards and, therefore, we recommend a two year timeframe.

The Interim Rule Unnecessarily Narrows The Statutory Definition Of "Certifying Official"

AILA urges USCIS to reconsider the interim rule's narrow definition of certifying official, and to reinstate its former policy that permitted an investigating officer or prosecuting attorney to provide certification that the U visa applicant is necessary for an ongoing criminal investigation.

Eligibility for U nonimmigrant status requires certification that the applicant is necessary for an ongoing criminal investigation. The statute provides a broad definition of officials authorized to provide certification, including: local law enforcement officials, prosecutors, judges, state or federal law enforcement or an official of the Service. [11] In contrast, the interim rule severely narrows the list of officials authorized to provide certification. Under the interim rule, authorization is limited to "the head of the certifying agency, or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency."[12]

The interim rule's narrowed category of officials authorized to provide certification is problematic for a number of reasons. It will require law enforcement agencies to engage in the process of designating specific officials who will be authorized to provide certification. In communities with large police departments, the process of designation could take a significant period of time, and adds a layer of bureaucracy to the U visa

[11] INA § 214(p)(1).

[12] 8 C.F.R. § 214.14(c)(2)(i). The supplemental information defines "certifying agency" but not "certifying official."

application process.[13] Moreover, neither the statute nor the rule compels agencies to establish a process for certification. This extra layer of bureaucracy will delay the issuance of the certification; at worst, it will cut eligible applicants off entirely.

What is perhaps most disconcerting about the certification requirement is that it diverges completely from prior USCIS policy in effect during interim relief. The previous policy stipulated that the certification "must in all cases be signed by the law enforcement official investigating or prosecuting the criminal activity."[14] The shift from authorizing officials with actual knowledge to authorizing an official, who is sure to be removed from the case, is a dramatic change in policy. However, nothing in the supplementary information explains, or acknowledges, the basis or rationale for this change.

Authorizing an investigating or prosecuting official to provide certification is more efficient, comports with the statutory definition of certifying official, and is consistent with the process for the law enforcement attestation (LEA) that is submitted with T visa applications.[15] It also ensures that the victim has access to the certifying official, which is important as the certifying official's primary responsibility is to investigate and/or prosecute, not to prepare certifications. It is often necessary to repeatedly follow up with a law enforcement officer or prosecutor, both of whom have myriad other responsibilities and restraints on their time. If the certifying official is one person, handling many requests in addition to other responsibilities, it is likely that some victims will be lost, and the stated purpose of the statute, "offering protection to victims,"[16] will not be met.

In contrast to the U visa, the T visa does not require certification or an LEA.[17] Rather, applicants for the T visa may submit credible secondary evidence to explain the nonexistence of the LEA.[18] Anecdotal information from abuse victim advocacy organizations indicate that many T visas are approved for victims who do not have certification. This is an important point, for while the standards are different for the T and the U, the goal of protecting victims remains the same. If there are *bona fide* T visa applicants without certification, the same will likely be true of U visa applicants.

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[13] For example The New York Police Department has over 37,000 police officers. http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml#1. The Chicago Police Department has over 13,600. http://egov.cityofchicago.org/city/webportal/portalContentItemAction.do?BV_SessionID=@@@@062999 1614.1194392630@@@@&BV_EngineID=ccccaddmhflffjhcefecelldffhdfhg.0&contentOID=536884045 &contenTypeName=COC_EDITORIAL&topChannelName=Dept&blockName=Police%2FDistricts+%26 +Units%2FI+Want+To&context=dept&channelId=0&programId=0&entityName=Police&deptMainCatego ryOID=-9079. The Los Angeles Police Department has 9,200 officers.http://www.joinlapd.com/about.html. Even the District of Columbia's Metropolitan Police Department includes more than 3,800 sworn police officers. http://mpdc.dc.gov/mpdc/cwp/view,a,1230,q,540333,mpdcNav_GID,1529,mpdcNav,|31458|.asp. This does not begin to address the many different units that are within each of these agencies.

[14] William R. Yates, Assoc. Dir. Operations, USCIS, "Centralization of Interim Relief for U Nonimmigrant Status Applicants" (October 8, 2003); http://www.uscis.gov/files/pressrelease/UCntrl100803.pdf

[15] 8 C.F.R. § 214.11(f)(1).

[16] *Id* at 3.

[17] 8 C.F.R. § 214.11(f)(1).

[18] 8 C.F.R. § 214.11(f)(3).

However, since there is no such option to apply for the U classification without certification, it is critical that the regulations do not further impede access to this documentation.

A broader definition of certifying official, more in line with USCIS interim U nonimmigrant status policy, would comport with the statute, provide more efficiency, and would serve the legislative intent behind U visa status.

Qualifying Family Members Granted Interim U Relief Should Have Their Age Locked In At The Time Of Filing For Interim Relief

AILA is concerned by the interim rule's requirement that the qualifying relationship for derivatives be in existence at the time of filing Form I-918. While Form I-918 was only recently released, eligibility for benefits under the statute has been available since August 2001.[19] Given that the form was only recently made available, this requirement would have the perhaps unintended consequence of disqualifying derivatives who were granted interim relief and whose relationship has since "aged-out." For example, principal applicants who were under 21 at the time of application for interim relief may now be separated from their parents and siblings, who may also no longer be under 18. Similarly, a principal applicant's children may have turned 21 in the four, five or six years since initial application.

A more equitable approach would lock in the age of applicants (both principals and derivatives) at the time interim relief was granted. Thus, the principal applicant – under 21 at the time of the grant of interim relief – would be considered 21 at the time the I-918 was filed. This is consistent with other sections of the rule, which recognize that U status is accorded as of the time U interim relief was approved. As indicated in supplementary information "the rule provides that principal petitioners and derivative family members who were granted interim relief and whose petition for U nonimmigrant status is approved will be accorded U nonimmigrant status as of the date that the request for U interim relief was approved." This is also reflected in the new regulations, at new 8 C.F.R. Section 214.14(c)(6) and new 8 C.F.R. Section 214.14(f)(6)(i).

The Interim Rule Will Lead To Extended Periods Of Detention For U Visa Applicants And Will Discourage Cooperation With Law Enforcement

AILA is concerned the interim rule will unfairly extend the time spent in detention for individuals who apply for U nonimmigrant status while in detention. AILA recommends that USCIS withdrawal the new 8 C.F.R. §§ 214.14(c)(1)(ii) and (f)(2)(ii).

Normally, aliens who are subject to a final order of removal and are detained in ICE's custody may request release from detention if they have been subject to post-order

[19] Cronin, Act'g Exec. Assoc. Comm'r, Office of Programs, INS memo HQINV 50/1, re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – "T" and "U" Nonimmigrant Visas (August 30, 2001).

detention for more than six months.[20] If the alien can provide "good reason to believe there is no significant likelihood of removal…in the reasonably foreseeable future," the alien will be released on an order of supervision.[21]

However, under new 8 C.F.R. §§ 214.14(c)(1)(ii) and (f)(2)(ii), the time during which a stay of removal is in effect will extend the period of detention. Therefore, it appears under the new regulations that if an alien in detention applies for U nonimmigrant status and requests a stay of removal, that alien will not be able to request release from detention, even after serving six months in detention. Instead, an alien – otherwise eligible for release after six months – must remain in detention solely as a result of applying for U nonimmigrant status.

This rule provides no incentive or encouragement to those in detention with information on a crime to cooperate with law enforcement officials. In fact, the mere fact that a U visa applicant is detained in a remote detention facility creates a physical barrier complicating the individual's ability to cooperate with the prosecution and investigation of a crime. Furthermore, rather than providing humanitarian relief to immigrant victims of crime, the detainee applicant is punished for requesting a form of immigration relief and is forced to remain in detention for a longer period of time than other detainees.

This provision of the interim rule does not further any legitimate purpose. Rather, it undermines the legislative intent of increasing cooperation with law enforcement and providing humanitarian relief. AILA recommends that USCIS withdrawal the new 8 C.F.R. §§ 214.14(c)(1)(ii) and (f)(2)(ii). Instead, the current post-order detention rules – providing the opportunity to request release after serving six months – should apply to U applicants as well.

The Rule's Requirement To File A Joint Motion With ICE To Terminate Removal Proceedings Leaves Too Much Discretion With ICE

AILA is concerned that requiring a joint motion to terminate removal proceedings for individuals with a pending I-918 application leaves too much discretion to the ICE attorney. The new 8 C.F.R. § 214.14(c)(1)(i) provides that applicants for U nonimmigrant status who are in removal proceedings can seek a joint motion with ICE to terminate the proceedings while the U application is being adjudicated by USCIS. The rule further notes that ICE counsel may agree as a matter of discretion to join this motion to terminate.

A better approach would model the rule after 8 C.F.R. § 1239.2(f), which allows an immigration judge, rather than the ICE attorney, the opportunity to terminate removal proceedings where an individual demonstrates *prima facie* eligibility for naturalization and where the matter involves exceptionally appealing or humanitarian factors. 8 C.F.R.

[20] *See* 8 C.F.R. § 241.13.

[21] 8 C.F.R. § 241.13(a); *see Zadvydas v. Davis*, 533 U.S. 678, 701 (2001); *Clark v. Martinez*, 543 U.S. 371, 386 (2005); *see* 72 Fed. Reg. 53022 (Sept. 17, 2007).

§ 1239.2(f) is an appropriate model, because, as Congress and USCIS have recognized, such humanitarian factors frequently exist in the context of an application for U nonimmigrant status, where the applicant is a crime victim and often targeted because of his or her immigration status.

According U Status As Of The Date Of Grant Of U Interim Relief Is Welcome

AILA notes with approval 8 C.F.R § 214.14(c)(6), which provides that principal aliens who were granted U interim relief and whose Form I–918 is approved will be accorded U–1 nonimmigrant status as of the date that the request for U interim relief was initially approved, and a parallel provision in 8 C.F.R § 214.14(f)(6)(i). This interpretation provides much-needed relief and protection for those aliens who would have been granted U visa status in the past, but were prevented from being accorded such status due to the lack of regulations, and to their qualifying family members whose eligibility is dependent on approval of U-1 status for their principals.

Specific Criteria Should Be Established To Limit USCIS Discretion To Remove Petitioners From The Waitlist

The interim rule at 8 C.F.R. § 214.14(d)(3) provides that USCIS may remove a petitioner from the waitlist and terminate deferred action or parole at its discretion. The Supplementary Information to the interim rule cites two instances where a petitioner may be removed from the waitlist, each relating to criminal convictions.[22] Currently, it is unclear whether only criminal convictions would cause USCIS to exercise its discretion to remove a petitioner from the waitlist or whether USCIS would have unfettered discretion. This rule is overly broad and grants too much discretion to USCIS. The rule should narrow USCIS's discretion by enumerating specific bases upon which removal from the waitlist could occur, thereby, in accordance with fairness and due process, providing specific guidance and notice to the petitioners of the consequences that could flow from certain activities.

AILA Encourages USCIS to Liberally Construe the Statutory Requirements for Adjustment of Status From U Nonimmigrant Status

While the regulations do not substantively address adjustment of status, we use this opportunity to urge USCIS to liberally construe the statutory requirement that the alien's continued presence in the United States is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest. The burden to establish eligibility for U status is on the applicant,[23] and the obligation to reasonably cooperate with law enforcement remains with the applicant until status is adjusted to permanent residency.[24] In addition, the Service has ample means and opportunity to revoke U nonimmigrant status. Therefore, we respectfully request that the burden on adjustment applicants granted U nonimmigrant status be minimal, and that there be a presumption in favor of

[22] See 72 Fed. Reg. 53027.
[23] New 8 CFR § 214.14.
[24] INA § 245(m).

such applications based on the grounds for which U nonimmigrant status was initially granted.

AILA appreciates the opportunity to comment on the proposed rule, and is hopeful that these comments will inform USCIS decisions on this matter.

Sincerely,

AMERICAN IMMIGRATION LAWYERS ASSOCIATION