



IDENTIFYING HUMANITARIAN FORMS OF RELIEF FOR DERIVATIVES

U Nonimmigrant Status

By Veronica Garcia

The U nonimmigrant status, often referred to as the “U Visa,” is a form of immigration relief available to noncitizens who have been victims of serious crimes in the United States. Individuals who are granted U status can remain lawfully in the United States. As part of the protection given to victims of crimes, U petitioners are able to include certain family members in the application process. These family members are known as “derivatives”. For many family members, being a derivative on an application may be the only way they will be able to get legal status in the United States. Because of this, it is important to understand when a derivative can be included on a petition, how to screen for their eligibility, and what would make them ineligible.

This practice advisory will only address derivatives in the U nonimmigrant context but keep in mind that many other forms of relief also allow for derivatives to be included, such as T visas and VAWA self-petitions. The chart below summarizes the derivatives allowed for these forms of humanitarian relief.

	<u>U Visa</u>	<u>T nonimmigrant</u>	<u>VAWA</u>
<u>Principal Applicant Over 21 years of age -</u>	Spouse or children under 21 years of age. ¹	Spouse and children. ²	<u>Spouse is the Self Petitioner</u> – unmarried children under 21.
<u>Principal Applicant Under 21 years of age -</u>	Spouse, children under 21 years of age, parents, or unmarried siblings under the age of 18.	Spouse, children under 21 years of age, parents, or unmarried siblings under 18 years of age. ³	<u>Child is the Self Petitioner</u> – Unmarried children under 21.
		<u>Regardless of principal applicant’s age if family member shows present danger due to cooperation or retaliation</u> – Any parent or unmarried sibling under 18 years of age or adult or minor child of a derivative. ⁴	<u>Parent is the Self Petitioner</u> – no derivatives!

¹ 8 CFR § 214.14(a)(10).

² 8 CFR § 214.11(a)(1).

³ 8 CFR § 214.11(a)(2).

⁴ 8 CFR § 214.11(a)(3).

The advisory outlines the requirements for ***U nonimmigrant derivatives*** as well as considerations to keep in mind when filing an application. For more detailed information on U nonimmigrant status and tips for submitting applications, advocates can look at the U visa manual available at the Immigrant Legal Resource Center's website.⁵

I. Common Family Member Terms in Immigration Law

Family unity is a longstanding concern of Congress and a motivation behind much of U.S. immigration law. This priority to keep families together is at the core of many immigration relief options, including humanitarian forms of relief, where immigrant survivors of crime and persecution are able to petition family members. To understand who can be included, it is important to learn who is considered family members under immigration law.

Spouses: Individuals are considered spouses under immigration law if the marriage creating the spousal relationship was legally valid in the location where the marriage was performed and celebrated.⁶ The marriage must also have been entered into in "good faith" and not simply to obtain an immigration benefit.⁷

Parents: Parent, father, and mother, are defined in relation to a child in immigration law, described below.⁸

Children: A child under immigration law is a person who is unmarried and under 21 years.⁹ This includes children born out of wedlock and stepchildren, if the parent and stepparent married before the stepchild's 18 birthdate.¹⁰ It also includes adopted children where the adoption occurred before the child turned 16.¹¹ The natural sibling of an adopted child also meets the definition of child, if the sibling is adopted by the same adopting parents before reaching age 18.¹²

Siblings: Siblings are persons who were once "children" with at least one parent in common.¹³ This also includes stepsiblings and adopted siblings as long as both stepsiblings were under the age of 18 when their parents were married, or the adopted sibling was under 16 when adopted.

II. Derivatives of U Nonimmigrant Applicants

A. Step 1: Who is the Principal Applicant?

Identifying if a client qualifies as a principal applicant is the first step in determining who can be included as a derivative. In the U nonimmigrant context, advocates will want to screen potential clients for two initial things: 1) have they been a victim of a crime in the United States and 2) did they report the crime to the police or help out in any way? If a potential client meets these initial screening questions, advocates can then see if they meet the eligibility requirements for U nonimmigrant status.

⁵ ILRC, *The U Visa: Obtaining Status for Immigrant Victims of Crime*, 6th Ed. 2019), available at <https://www.ilrc.org/publications>.

⁶ *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982).

⁷ *Lutwak v. United States*, 344 U.S. 604 (1955).

⁸ INA § 101(b)(2).

⁹ INA § 101(b)(1)(A).

¹⁰ INA § 101(b)(1)(B).

¹¹ INA §§ 101(b)(1)(E)(i), (F)(i), (G)(i).

¹² INA §§ 101(b)(1)(E)(ii), (F)(ii), (G)(iii).

¹³ *Matter of Garner*, 15 I & N Dec. 215 (BIA 1975).

Eligibility for U Nonimmigrant Status:

To qualify for this form of relief, applicants will need to show they:

- have been the victim of a qualifying criminal activity;¹⁴
- have suffered substantial physical or mental abuse as a result of having been the victim of qualifying criminal activity;
- possess information concerning that criminal activity;
- have been helpful, are being helpful, or are likely to be helpful in the investigation or prosecution of the criminal activity;
- have certification from a federal, state, or local law enforcement authority certifying their helpfulness in the detection, investigation, or prosecution of the criminal activity; and
- the criminal activity violated the laws of the United States or occurred in the United States.¹⁵

Who Can Be Principal? In the U visa context, there might be times when both a parent and a child may qualify as the victim of the crime. This is likely the case when the victim is a child; because of the child's age when the crime occurred, the parent might have helped with reporting and cooperation. If this is the case, it is important to see whether it would be more beneficial for the family for the parent or child or both to be principal applicants. This depends on many factors, including the strength of the case, the certification from law enforcement, and who can potentially include more derivatives.

Example: MJ's 12-year-old child was sexually assaulted by their uncle. MJ helped their child report the crime and took them to meet with law enforcement whenever it was needed. MJ wants to make sure that if they are eligible for a U visa, they can include both her spouse and her 19-year-old daughter.

Who would be the principal applicant?

If the 12-year-old child is the principal, they will be able to include MJ and her spouse but not the 19-year-old daughter. This is because principal applicants under 21 years old can include their parents and unmarried siblings who are under 18 years old. Here the 19-year-old daughter would not qualify as a derivative of her sibling.

If MJ is the principal, she would be able to include her spouse, 19-year-old daughter, and the 12-year-old child. This is because applicants over 21 years old can include their spouse and children under 21 years of age. Because MJ could include more derivatives if she applied as the principal, MJ should be screened to see if she can meet the U visa criteria herself to qualify as a principal applicant, including how she cooperated with law enforcement, and how she suffered because of the abuse to their 12-year-old child.

¹⁴ A qualifying crime is defined as abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labor contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraints, or other related crimes. Also includes attempt, conspiracy, or solicitation to commit any of the above and other related crimes.

¹⁵ INA § 101(a)(15)(U).

B. Step 2: Who are the Derivatives?

In order to know who can be included as a derivative, advocates will have to check that the family member meets the derivative requirements.

1. Derivative Basics:

U principal petitioners can generally include their spouses, children, parents, and unmarried siblings under 18 years of age. Who a U principal can include will depend on the age of the principal petitioner when they file the U nonimmigrant application.¹⁶ Moreover, in order to include a derivative, the relationship between the derivative and principal must have existed when the U principal filed and continue to exist until the petition is adjudicated.¹⁷ Lastly, even though there is a 10,000-visa limit for U visas, this numerical limitation does not apply to derivatives.¹⁸

U Visa Derivatives Classification

- **U-1—Principal Petitioner**—principal petitioner who suffered substantial harm and cooperated with law enforcement.
- **U-2—Spouse**—Spouse of U-1. Individuals must be legally married to the U-1 prior to the U-1 filing their application. Divorce from the U-1 will result in the U-2 losing their ability to qualify as a derivative.
- **U-3 Child**—Child of the principal petitioner. They must be unmarried and under 21 years of age prior to the U-1 filing their application.
- **U-4—Parent**—Parent of U-1 petitioner if the U-1 petitioner is under 21 when they file their application for U status.
- **U-5—Siblings**—Unmarried sibling who is under 18 years old if the U-1 petitioner is under 21 when they file their own application for U nonimmigrant status.

2. Who can be included in the application?

Scenario 1: If the principal petitioner is 21 year of age or older:¹⁹

Principal petitioners who are 21 years of age or older can include their spouses and unmarried children under 21 years old.

After-acquired: U-1 petitioners will not be able to include spouses as derivatives who they marry after they submit their U-1 application. Nevertheless, they may be able to include these spouses through a petitioning process for qualifying family members at the adjustment stage. This process takes place at the time the principal U-1 nonimmigrant holder is ready to adjust status or can occur after the U-1's adjustment so long as the familial relationship existed as the time the U-1's adjustment was granted. This is discussed in more detail below.

Age out protections for children: The age of the qualifying family member is determined on the date that the principal properly files their forms.²⁰ The child's age freezes when the principal files their U petition and stays the same until

¹⁶ INA § 214(p)(7)(B).

¹⁷ 8 CFR § 214.14(f)(4).

¹⁸ INA § 214(p)(2).

¹⁹ 8 CFR § 214.14(a)(10)

²⁰ AFM 39.1(f)(4)(i)-(v).

the application is adjudicated.²¹ This means that if the child is under 21 years of age when their parent files their application, they will continue to be considered a “child” while their parent’s petition is pending.²²

Born after U-1 application filed: In the case where the U-1 became a parent of a child after the U-1 filed, the child will still be eligible and seen as a qualifying family member. The child will be eligible to accompany or follow to join the principal.²³

Marriage: Children derivatives must remain unmarried until the U visa process is complete and their applications have been adjudicated. Marriage will make them ineligible. Derivative children should be warned to stay unmarried until their I-918A has been approved and, conservatively, until they adjust status. Although there is a possibility that marriage while in U status will not jeopardize their ability to adjust status, it is safest to wait to marry until after they have successfully adjusted status.

Scenario 2: If the principal petitioner is under 21 years of age:²⁴

Spouses & Children—The requirements for these derivatives for U petitioners under 21 years of age are the same as for U petitioners who are 21 and older described in Scenario 1.

Parents— A parent will be a qualifying family member if they meet the definition of parent as defined by the relationship to the child. They can be included as a derivative if the U-1 is under 21 years of age when they file their application. Note that in order to include stepparents, the stepparent must have married the biological parent prior to the U-1 turning 18 years old.

Example: Patricia is applying for a U visa as a victim of felonious assault after being robbed and beaten when she was 13 years old. Although Patricia’s parents have been together since before her birth, they are not legally married, and Patricia’s dad is not her biological dad.

Patricia wants to know if she can include both of her parents as derivatives if they get married.

Patricia is under 21 years of age, so she can include parents as derivatives. She can include her mother. But her father does not fall within any of the definitions in INA § 101(b). He is not her biological father, and he is not her stepfather (for immigration purposes) because her parents did not get married before her 18th birthday. She will be unable to include him as her derivative.

Unmarried siblings under 18 years of age—This can include both biological and stepsiblings, if they meet the definition established by immigration law.²⁵ The age of the sibling freezes on the day the principal application is filed. This means that USCIS will continue to consider the sibling a derivative even if the principal is no longer under 21 years of age and the sibling are no longer under 18 years of age at the time of the adjudication.²⁶

Marriage: There is no “marry out” protection for siblings therefore siblings **MUST** remain unmarried until the U visa process is complete. There is a possibility that they may be able to marry after the I-918A is approved and still be

²¹ Note that while it is true that the child’s age freezes when the U-1 files their application, per the expansion of protections given by VAWA 2013 for U nonimmigrant derivatives, there has recently been some pushback by USCIS. Practitioners report that in a few cases, USCIS has questioned the eligibility of child derivatives who filed **AFTER** the U-1 filed and **AFTER** the child was already 21. In these instances, USCIS’s interpretation of the age-out protections are a narrow reading that protects only those child derivatives whose applications were pending when they turned 21.

²² INA § 214(p)(7)(A)

²³ 8 CFR § 214.14(f)(4).

²⁴ *Id.*

²⁵ INA § 101(b)(1)(B)

²⁶ 8 CFR § 214.14(f)(4)

able to adjust as a U nonimmigrant, but it is safest for them to remain unmarried until after they are able to adjust status.

Practice Pointer: Parents of Principal Applicants under 21 Years of Age Should Qualify as Derivatives Even if Principal Applicant Is Married.

Generally, a child is defined for immigration purposes as an unmarried individual under 21 years old. However, parents may be able to be included as derivatives for their “children” even if the children are married because of the way the statute is worded. Nothing in the statutory language invokes the term “child,” which would require the principal petitioner to be both under 21 years of age and unmarried. Despite language in the regulations that seems to limit eligibility for U nonimmigrant status to derivative parents whose under 21-year-old children are unmarried, according to the statute, parents should be able to qualify as U derivatives even if their children are married. In other words, according to the statutory language, if the principal petitioner is under 21 years of age and married, they should still be able to include both their parents and their spouse as a derivative (in addition to their children and minor siblings).

3. At what point in the application process can derivatives be included?

The application can be filed together with the principal’s or separately. Note that U principals are able to include derivatives until the point of adjustment. U derivatives are able to adjust independently of the U principal; but in order to get U status, they must be admitted into the United States (if abroad) before the U-1 adjusts. For derivatives abroad, this may mean that the U-1 will need to extend their status to allow for derivatives to enter and thus obtain status. Additionally, an extension can be requested to allow the derivative to meet the three-year requirement of U status that will allow them to adjust.²⁷

Example: Louie received her U status on October 1, 2017. When she submitted her U application, she also included her two derivative sons who were in Guatemala at the time. They were both approved on the same date as Louie, but they did not enter the United States until June 2019. This will make the derivatives eligible to adjust in June 2022, but Louie is able to adjust in October of 2020.

Does Louie have to extend her U Visa? Do her children need to extend their U Visas?

Here, Louie does not have to wait until her derivatives are eligible to adjust for her to adjust because the derivatives are already in the United States and have been granted U status. Derivatives in the U context can adjust separately from the principal. Note though, that the derivatives might need to extend their status in order to meet the physical presence requirement for adjustment, as they were likely only given U nonimmigrant status until 2021, when Louie’s U status expires.

Advocates should note that there has been some pushback on applications filed AFTER the derivative child turns 21 even when the U-1 applicant filed their application before the child turned 21. Please see Footnote 21 for more information. Because of this, it may be advisable to submit the I-918A for derivative children before they turn 21 years of age to avoid any delays in adjudication.

²⁷ 8 CFR § 214.14(g)(2)

4. Revocation of U status:

The revocation of the principal U status will result in the revocation of the derivative status, and the denial of any pending derivative applications.

Example: John was granted a U visa in 2018 based on felonious assault. When he filed his application, John included his 10-year-old daughter Mary. John failed to disclose that while his application was pending, he was convicted of drug trafficking. This recently came to the attention of USCIS and they revoked John's U-visa, saying he was not eligible for the relief. Since Mary's U status is dependent on John's eligibility, her U status will also be revoked.

5. Death of U-1 applicant:

Section 204(l) protects U derivatives where they were already admitted as a U derivative, i.e. granted U status and having entered the United States, at the time of death of the principal U applicant. Therefore, USCIS will not approve applications for derivatives where the principal applicant died before approval. If the derivative already had status of U nonimmigrant, they can apply for adjustment of status, despite the death of the principal.²⁸

III. U Nonimmigrant Status Derivative Application Packet

The U nonimmigrant principal petitioner will need to file on behalf of their derivative by submitting a Form I-918A, Supplement A. This application will be completed from the point of view of the principal petitioner. The principal will need to sign all family member petitions. Each qualifying family member will need to submit their own I-918A.²⁹ There is no filing fee for the I-918A or the biometrics (required for all applicants over the age of 14), but there is a filing fee associated with the inadmissibility waiver and the applications for work authorization (unless the person can demonstrate eligibility for a fee waiver).

Most applications for derivatives will include the following initial evidence/applications:

- Form I-918A, Supplement A;
- Evidence of the family member's qualifying relationship;
- Form I-912 and filing fee (or fee waiver request) if the family member falls under any inadmissibility grounds;³⁰
- For family members in the USA:
 - Form I-765, application for work authorization, and
 - Copy of passport.

Applications for U derivatives will be filed with the Vermont Service Center (VSC) for processing unless the application is being filed after the principal's and their own application has been transferred to the Nebraska Service Center (NSC).

IV. Including Derivatives Through the I-929 Process

This practice advisory is about U visa derivatives, but it is important to note that there is another way for a U principal to include family members.³¹ If the U principal did not petition for their family member before adjustment (perhaps the

²⁸ USCIS, *Approval of Petitions and Applications after the Death of the Qualifying Relative under New Section 204(l) of the Immigration and Nationality Act*, (Dec. 16, 2010) available at: <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2011/January/Death-of-Qualifying-Relative.pdf>.

²⁹ 8 CFR § 214.14(f)(2).

³⁰ 8 CFR § 214.14(f)(3).

³¹ 8 CFR § 245.24(g).

relationship did not exist at the time, or perhaps the petition was not filed due to financial or logistical difficulties), they may be able to be included using an I-929, for qualifying family members. U-1 petitioners can include certain qualifying family members who never held U nonimmigrant status. In order to qualify for this, the U-1 petitioner must be adjusting or have already adjusted based on the U visa. They will also need to show that their qualifying family member would suffer extreme hardship if they are not allowed to remain or enter the United States.³²

The I-929 process can be a game-changing option for family members who were acquired after the principal filed (such as a new spouse), or for derivatives who were left out for whatever reason at the initial filing. Through the I-929 process, a U-1 can include the following qualifying family members:

- (if the U-1 is under 21 years) spouse, unmarried children under 21 years of age, and parents;
- (if the U-1 is over 21 years) spouse or unmarried children under 21 years of age.

Note at this stage, U-1s will not be able to petition for their siblings.

The petition for qualifying derivatives can be filed concurrently with their adjustment of status application or at any time after they have filed their adjustment. For more information on the I-929 process, please see the ILRC's *U Visa Manual*.

V. Conclusion

This practice advisory is an introduction to who can be included in a U nonimmigrant status application as a derivative. It is important to understand who can be included as a derivative to ensure all possible avenues for relief are explored for the client, and any family members they may wish to include.

³² 8 CFR § 245.24(g); INA § 245(m)(3).



San Francisco

1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

ilrc@ilrc.org www.ilrc.org

Washington D.C.

1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin

6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio

500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

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