



**TO:** SUSAN DUDLEY, OIRA-OMB  
**FROM:** LESLYE ORLOFF, LEGAL MOMENTUM  
**SUBJECT:** T AND U ADJUSTMENT INTERIM FINAL RULE  
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**GOOD CAUSE JUSTIFICATION FOR ISSUANCE OF INTERIM “T AND U-VISA ADJUSTMENT REGULATIONS”**

In 2005, as part of the Department of Justice Authorization Act, Congress mandated that the Department of Homeland Security issue implementing regulations for both Violence Against Women Act 2000 and Violence Against Women Act 2005 within 180 days of passage of the law, which would be July 5, 2006. See PL 109-162. Last May we met with you when OIRA was reviewing the U-Visa interim rule. In 2002 INS issued the T-visa interim rule. Since by 2005 the only regulations issued by DHS implementing VAWA 2000 were those for which Congress specified a specific regulation issuance date – the T-visa provisions. In light of this history, Congress in VAWA 2005 included a mandate giving the Department of Homeland Security six months to issue regulations implementing the U-visa regulations, T and U adjustment regulations and regulations pertaining to other immigration provisions of VAWA 2000 and VAWA 2005. This approach contributed to DHS issuance of the U-visa interim final rule in September of 2007 and helped in encouraging DHS to promulgate the interim final T and U-visa adjustment rule OIRA is currently reviewing. There are trafficking victims who received T-visas as early as the fall of 2001 who are still awaiting this rule to be able to apply for and receive adjustment of status to lawful permanent residency.<sup>1</sup> There are also U-visa victims with interim U-visas since as early as the fall of 2001<sup>2</sup> who will be eligible to apply for adjustment of status as soon as their U-visa application is awarded. How these immigrant victims’ lives are harmed and their health and safety jeopardized by the extensive DHS delay in issuing regulations is illustrated in the book of stories we have submitted along with this memo. We urge OIRA to approve this T and U-visa adjustment regulation as an interim final rule that will take effect immediately as such action is needed to protect the life and safety of crime victims and our communities. The

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<sup>1</sup> Applications for T and U-visa interim relief were accepted at INS beginning August 30, 2001. See Michael D. Cronin, Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2 – “T” and “U” Nonimmigrant Visas, August 30, 2001 (HQNV 50/1).

<sup>2</sup> Id.

Administrative Procedures Act specifically authorizes this approach as good cause exceptions for public health and public safety.

The Department of Homeland Security must issue T and U-visa adjustment visa regulations immediately. In issuing T and U-visa adjustment regulations and regulations implementing other provisions of VAWA 2000 and VAWA 2005 DHS should appropriately issue these regulations as interim regulations that take effect immediately upon issuance. Opportunity for notice and comment should be provided at the same time as the interim regulations take effect. This approach is necessary to avoid frustrating Congressional intent in VAWA 2005 and is needed to further the public health and safety. The legislative history of VAWA 1994, VAWA 2000 and VAWA 2005 is replete with references to, explanations of, and justifications for Congress' dual purposes of VAWA – to strengthen relief and protection for victims of domestic violence, sexual assault, stalking and trafficking and to facilitate investigation and prosecution of the perpetrators of these crimes. For this reason when issuing VAWA 1994 implementing regulations and T-visa regulations INS/DHS correctly, in each instance, issued interim regulations. The discussion below describes why this approach squarely fits within the good cause exception of the Administrative Procedure Act (APA) that allows for issuance of interim regulations. In light of the Congressional mandate for issuance of regulations, the agency's failure to meet this statutory deadline and the victim safety and perpetrator accountability goals of VAWA, courts are highly likely to find that the Secretary had ample good cause for issuance of interim regulations that will go into effect immediately to provide relief to victims. On the other hand, issuance of proposed regulations will utterly frustrate Congress' intent to assure that immigrant victims of crime, domestic violence, sexual assault and trafficking can finally access immigration relief Congress created for them. In the context of T and U-visa adjustment regulations some immigrant victims have been statutorily eligible to apply for adjustment of status for over 4 years.

#### **GOOD CAUSE FOR INTERIM RULEMAKING**

The Administrative Procedures Act (APA) contains a good cause exception that provides a mechanism for issuance of interim regulations that take immediate effect prior to offering the public an opportunity for notice and comment. While agencies are usually required to issue notice of the proposed rule, provide the public with an adequate opportunity to comment on the proposed rule, and provide an explanation of the rule ultimately adopted, APA §5 U.S.C. 553

(b)(3)(B), permits an agency to bypass the notice and comment procedures where good cause exists. Federal agencies are authorized by the APA to issue interim regulations “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”

When the good cause exception applies, an agency need not provide 5 U.S.C § 553 notices prior to the interim regulation taking effect. The agency need not consider comments received in response to the notice before implementing the regulations, as 5 U.S.C § 553(c) would otherwise require. *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 59 F.3d 1219, 1223 (1995). The agency issues interim regulations that are implemented immediately and at the same time provides the public notice and an opportunity to comment on the interim rule. Comments received are taken into account in the development and explanation of the final rule that is adopted. Case law demonstrates that where an agency justifies promulgation of an interim regulation, without notice and comment procedures, to address public health and safety needs, and comply with Congressional mandates for implementing regulations, the good cause exception has been deemed satisfied.

#### **HISTORY OF INTERIM RULEMAKING UNDER VAWA, THE TVPA AND THE U-VISA**

The overarching goal of the Violence Against Women Act of 1994 was to enhance the social services and justice system protections available for battered women and victims of sexual assault. Recognizing that immigration laws are often used as tools of power and control over immigrant victims of domestic violence, VAWA included special protections for immigrants abused by U.S. citizens or lawful permanent resident spouses or parents. When the legal immigration status of these non-citizen victims depends upon their relationship to their U.S. citizen or legal permanent resident abusers, the abuser frequently uses this power over their spouse and/or children’s immigration status to control, threaten, isolate, harass, and coerce the immigrant victims.<sup>3</sup> Fearing removal by Immigration and Customs Enforcement, immigrant victims do not seek the protections offered by our civil and criminal justice systems. The immigration protections included in VAWA 1994 and expanded by Congress in VAWA 2000 and again in VAWA 2005 were designed to provide immigration relief that is critical to enhance

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<sup>3</sup> Violence Against Women Act of 2000, 106th CONG. REC. S10,192 (2000) (reciting statement of the joint managers); H.R. REP. NO., 103-395, at 26 (1993)( The House of Representatives Committee on the Judiciary found that domestic abuse problems are “terribly exacerbated in marriages where one spouse is not a citizen and the non-citizens’ legal status depends on his or her marriage to the abuser.”)

the ability of immigrant victims to come forward and access victim services and justice system protections. VAWA has increasingly sought to cut off the ability of abusers and crime perpetrators to misuse the immigration laws in order to threaten and control victims and their children.

In promulgating an interim rule to implement VAWA 1994's immigration protections, the Immigration and Naturalization Service (INS) exercised the good cause exception specifically acknowledging the regulation's impact on enhancing family well-being. See 61 Fed. Reg. 13061 (March 26, 1996). The INS issued an interim rule, with provisions for post-promulgation public comment, based on the good cause exception found at 5 U.S.C § 553(b)(3)(B) and (d)(3). The INS effectively explained that the necessity for immediate implementation of the interim rule was due to:

“The changes to the Act made by section 40701 of the Crime Bill became effective on January 1, 1995. Immediate implementation of this rule will allow a qualified spouse or child of an abusive citizen or lawful permanent resident to immediately self-petition for immigrant classification. Prompt implementation will also allow a spouse or child who is filing based on the relationship to an abusive lawful permanent resident of the United States to establish a more favorable place on the immigrant visa number waiting list. Qualified self-petitioners are all residing in this country and are persons of good moral character. They have been prevented from obtaining immigrant classification in the past solely because their abusive spouse or parent withdrew or refused to file the necessary immigrant visa petition for them.”

Similarly, when INS issued regulations implementing The Victims of Trafficking and Violence Protection Act of 2000 (TVPA), the agency issued an interim rule. The TVPA sought to stop the trafficking of and offer protection for the nearly 700,000 persons, annually, primarily women and children, who are trafficked within the U.S. or across international borders. See 67 Fed. Reg. 4784 (January 31, 2002). The TVPA created T-visas and allowed for the continued presence of aliens who have been victims of severe forms of trafficking, so that they will be available to assist with the investigation and prosecution of the traffickers. Congress established T-visas particularly to create a permanent safe haven for certain eligible victims of trafficking.

In January 2002, the INS promulgated an interim rule offering immediate access to T nonimmigrant status and invited post-promulgation comments. As with VAWA 1994, the INS issued the T-visa interim rule under the APA good cause exception in 5 U.S.C § 553(b) justifying superseding normal rulemaking procedures by finding that, in light of the public safety implications of the rule, giving prior notice and opportunity to comment would be contrary to the public interest. INS specifically found that:

“In passing the TVPA, Congress intended to create a broad range of tools to be used by the Federal government to combat the serious and immediate problem of trafficking in persons. The provisions of the TVPA address the effect of severe forms of trafficking in persons on victims, including many who may not have legal status and are reluctant to cooperate. In trafficking in persons cases, perpetrators often target individuals who are likely to be particularly vulnerable and unfamiliar with their surroundings. The TVPA strengthens the ability of government officials to investigate and prosecute trafficking in persons crimes by providing for temporary immigration benefits to victims of severe forms of trafficking in persons. . . . Without the prompt promulgation of this rule, victims of severe forms of trafficking in persons might continue to be victimized for fear of coming forward, thus hindering the ability of law enforcement to investigate and prosecute cases and preventing victims from obtaining critical assistance and benefits.”

Congress expanded the range of immigration protections and other legal remedies for immigrant victims in the Violence Against Women Acts of 2000 and 2005, recognizing that the legislative protections available to immigrant victims of domestic violence, sexual assault, trafficking and other specified, often violent, crimes remained incomplete. VAWA 2000 created the U-visa for immigrant victims of crime. The U-visa was designed to offer relief for immigrant victims left out of and who may not qualify for other VAWA relief. This nonimmigrant visa offers temporary lawful status to victims of certain serious crimes who are willing to be, have been or are cooperating in investigations or prosecutions of criminal activity. It also offers the ability to apply for lawful permanent residency after 3 years to both T and U-visa victims. VAWA 2005 further broadened the protections available to battered immigrants

and provided for amendments to the U-visa and T-visa and to adjustment of status under these two visas.

In the context of granting a good cause exception for issuing the U-visa rule as an interim final rule. DHS stated the following:

USCIS has determined that delaying this rule to allow public comment would be impracticable and contrary to the public interest; thus, this rule is being published as an interim final rule and is effective 30 days after publication. Nonetheless, USCIS invites comments and will address comments in the final rule.

USCIS finds a compelling public need for rapid implementation of this rule justifying the exception allowed by the Administrative Procedure Act (APA) to the requirements for soliciting public comment before a rule shall take effect .5 U.S.C. 553(b)(3)(B). This exception should be used by agencies in cases, such as this, where delay could result in serious harm. See, *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174 (D.C. Cir. 2004) (finding the exception excuses notice and comment where delay could result in serious harm). Congress created the new U classification to curtail criminal activity, protect victims of crimes committed against them in the United States, and encourage victims to fully participate in the investigation of the crimes and the prosecution of the perpetrators. See BIWPA sec. 1513(a)(2). Many immigrant crime victims fear coming forward to assist law enforcement until this rule is effective. Thus, continued delay of this rule further exposes victims of these crimes to danger, and leaves their legal status in an indeterminate state. Moreover, the delay prevents law enforcement agencies from receiving the benefits of the BIWPA and continues to expose the U.S. to security risks and other effects of human trafficking. Therefore, delay in the implementation of these regulations would be contrary to the public interest.

Further, USCIS finds that the good cause exception is warranted by the statutorily imposed deadline and the complicated nature of this rule. Agencies may bypass public comment when a statutorily imposed deadline is combined with a complicated statutory or regulatory scheme and there is either evidence that the agency has been diligent in its efforts to comply with the statutory deadline or a compelling need for rapid implementation of the regulation. See *Methodist Hosp. Of Sacramento v. Shalala*, 38 F.3d 1225 (D.C. Cir. 1994) (5 month statutory deadline and complex regulatory framework constituted good cause for exception); *Petry v. Block*, 737 F.2d 1193, 1201 (D.C. Cir. 1984) (agency's good cause argument was justifiable "in light of extremely limited timeframe given by Congress in relation to amount of work required to produce rule."). Section 828 of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Pub. L. 109-162, January 5, 2006) requires DHS to publish regulations required by that Act within 180 days after enactment (i.e., July 4, 2006). Unfortunately, the statutory and regulatory framework of U.S. immigration laws is

exceedingly complex. *See Zadvydas v. Davis*, 533 U.S. 678 (2001). Plus, these regulations have required input and coordination with law enforcement agencies affected by this rule to balance its humanitarian goals and law enforcement interests.

Accordingly, DHS finds that good cause exists under 5 U.S.C. 553(b) to make this interim rule effective 30 days following publication in the **Federal Register**, before closure of the 60-day public comment period. DHS nevertheless invites written comments on this interim rule, and will consider any timely comments in preparing a final rule.

#### **COURT RULINGS SUPPORTING GOOD CAUSE TO PROTECT PUBLIC HEALTH AND SAFETY**

Case law also supports the public health and safety justifications advocated by the INS in promulgating interim rules for VAWA 1994 and VTVPA. Courts have found that agency's desire to address the public interest by ensuring health and safety can necessitate interim rulemaking without notice and comment procedures. The courts, in such instances, have upheld interim rules finding that the agency's action was justified under the APA's good cause exception.

In *Schneider v. Chertoff*, the Secretary of Homeland Security promulgated an interim rule to implement the Nursing Relief Act. 450 F.3d 944 (9<sup>th</sup> Cir. 2006). The Secretary implemented the interim rule immediately without prior notice or comment citing the good cause exception at 5 U.S.C. § 553(b)(B) and (d)(3). Specifically, the Secretary recognized the immediate public health need to bring physicians to underserved areas without further regulatory delay. The Secretary sought public comment and noted that he would address those comments prior to the issuance of a final rule. The Ninth Circuit found that the good cause exception was satisfied and upheld the necessity of immediate implementation of the rule. Domestic abuse, trafficking, sexual assault, and crimes that cause substantial harm to crime victims pose significant public health risks. Delayed access to immigration relief can lead to continuing victimization.

In *Reeves v. Simon*, the court upheld the interim regulation as "impracticable, unnecessary, or contrary to the public interest" to prevent violence and ensure public safety. 507 F.2d 455 (Temporary Emergency Court of Appeals 1974). The Federal Energy Office's needed to stop discriminatory practices in allocating fuel that caused long lines that at times led to violence required immediate action. In passing the Violence Against Women Act in 1994 and reauthorizing it in 2000 and 2005 Congress created federal remedies to combat violence against women that supplemented state laws that have been enacted since the early 1970s. Domestic

abuse, sexual assault and other violent crimes plague communities across the country as perpetrators continue to commit these crimes until society holds them accountable. When victims receive the legal protection and support they need, public safety is enhanced. To receive U nonimmigrant status, victims must obtain certification from a government official that they are willing to, have been or are being helpful in an investigation or prosecution of criminal activity. The assistance U-visa victims offer strengthens government officials' ability to investigate and prosecute abuse, assault, trafficking, and other crimes. The justice system's ability to prosecute perpetrators of violent crime, domestic violence, sexual assault and trafficking is undermined the longer victims have to wait for regulations thus increasing the public health consequences for communities.

Ensuring the health and safety of wildlife has been upheld as proper justification for rulemaking that bypasses the APA's notice and comment procedures. In *Northern Arapahoe Tribe v. Hodel*, the Secretary of the Interior invoked the good cause exception of section 553(b)(B) because the hunting season on the reservation had already begun and because the Fish and Wildlife Service studies "indicated that in the absence of a Game Code (interim rule) wildlife could be reduced to a point where normal propagation and recovery will not occur." 808 F.2d 741 (10<sup>th</sup> Cir. 1987). In this instance preventing the potential possibility of an endangered fate was sufficient to sustain a good cause exception. The ill fate of immigrant victims without implementing regulations is a certainty. In the absence of interim rules implementing VAWA 2000's and VAWA 2005's T and U adjustment provisions and other VAWA protections, more and more immigrant victims will continue to be abused, assaulted, trafficked, and subjected to other heinous crimes.

Courts have upheld use of the good cause exception by the Immigration and Naturalization Service when an interim rule was issued for the purpose of furthering criminal investigations. In *ACLU of N.J., Inc. v. County of Hudson*, the INS issued an interim regulation, effective immediately upon signing without notice and comment procedures, forbidding state or local governments from disclosing INS detainee information. 352 N.J. Super. 44 (NJ 2002). In this case the court found that the fact of ongoing criminal investigations, the need to protect detainees from retaliation, and the need to encourage detainees to provide valuable information, supported interim regulations and sought post-promulgation public comment under the APA. U-visas strengthen the ability of government officials to investigate and prosecute crimes by



providing temporary immigration benefits to victims who assist in the process. Promulgation of proposed and not interim rule will lead to continued victimization of victims who fear coming forward and will thereby hinder the ability of government officials to investigate and prosecute many crimes.

### **CONGRESSIONAL MANDATE**

In VAWA 2005, Congress specifically states that rulemaking should be promulgated within 180 days of the Act. This deadline passed on July 5, 2006. At the time that Congress enacted the Violence Against Women Act of 2005, Congress was keenly aware that neither the INS nor DHS had ever issued regulations implementing VAWA 2000's protections for immigrant victims, particularly the U-visa and VAWA 2000's self-petitioning and cancellation of removal improvements. Congress understood VAWA's significance for victims, law enforcement, prosecutions, public safety and public health and therefore intended that implementing rules be issued in a timely manner. Over 6 months have passed since this deadline. Every day that goes by adversely affects numerous immigrant victims of domestic violence, sexual assault, trafficking, and other horrendous crimes. In *Universal Health Services of McAllen, Inc. v. Sullivan*, the Federal District Court upheld the Secretary of Health and Human Services' issuance of an interim rule two months after a Congressionally set deadline under the APA's good cause exception. 770 F. Supp. 704, 721 (DC 1991). The court ruled that to hold that the Secretary's delay in promulgating rules precludes a finding of good cause to proceed without notice and comment would "utterly frustrate Congress' intent ... and would, in effect, create a penalty, which is at complete odds with Congress' mandate, for the [Secretary's] failure to promulgate rules in a time fashion." *Petry v. Block*, 737 F. Supp 2d 1193, 1202 n. 19 (D.C. Cir. 1984).

### **CONCLUSION**

Victims of domestic violence, trafficking, and other crimes face a variety of legal, health and safety concerns that are further exacerbated when victims lack access to legal immigration status. For this reason Congress included protections for immigrant victims in VAWA 1994, 2000 and 2005 including offering the ability to apply for lawful permanent residency to victims who have been granted T-visas and U-visas. Victims granted temporary 4-year visas as T-visa victims and U-visas victims need to be able to apply for lawful permanent residency. For those eligible to apply for lawful permanent residency as T and U-visa victims, the uncertainty of

temporary status destabilizes their lives and interferes with their ability to heal, overcome the effect of crime victimization and move on with their lives. Each time they are required to face the continuous uncertainty of not having permanent status and not knowing whether they will be successful in attaining lawful permanent residency their mental and physical health is affected by the ongoing retraumatization that occurs each time they have to seek extension of deferred action, extension of work authorization. The public safety and public health goals of VAWA are clear and well documented both by Congress and published research. A review of federal court rulings makes clear that DHS issuance of an interim T and U-visa adjustment rule that takes effect immediately offering post-promulgation public opportunity for comment would be sustained by federal court on public health and public safety grounds.

Issuance of the interim regulation must include a detailed explanation of how this interim regulation promotes the public's interest in crime control and promoting public health of victims and their children, including U.S. citizen children. This justification should be similar to the justification for issuance of an interim rule for VAWA 1994, the T-visa and the U-visa. The need for issuance of an interim rule is also importantly the only approach that DHS can take that is consistent with Congressional intent. This approach is both most likely to be sustainable against challenge in a court of law and is the only option conscionable in terms of promoting the safety of victims and communities across the United States.