Practice Alert: New ICE Guidance on Civil Enforcement Actions Involving Current or Potential Beneficiaries of Victim-Based Benefits

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Introduction

On January 31, 2025, it was reported on social media that the previous day, Immigration and Customs Enforcement (ICE) had issued new policy guidance to its employees entitled *Interim Guidance on Civil Immigration Enforcement Actions Involving Current or Potential Beneficiaries of Victim-Based Immigration Benefits* ("Interim Guidance"). ICE recently published the text of the Interim Guidance, which rescinds certain prior ICE directives on enforcement against immigrant survivors of crime, trafficking, or abuse, and replaces them with new guidance.[2]

Summary

The Interim Guidance does NOT CANCEL the U or T visa program; these protections were created by Congress and the Administration cannot unilaterally take them away.[3] Nor does the Interim Guidance rescind the Bona Fide Determination (BFD) process for T or U benefit requestors.[4]

The Interim Guidance outlines four key policy points for ICE officers and agents including:

1) Coordination with law enforcement as appropriate to avoid compromising investigations or other enforcement actions;
2) Procedures for enforcement actions involving individuals with pending or approved "victim-based benefits";

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[1] Prepared by Cecelia Friedman Levin with the Alliance for Immigrant Survivors, Cristina Velez and Rebecca Eissenova at ASISTA with Sonia Parras Konrad, Carson Osberg, Erika Gonzalez, Hilary Chadwick, Kristen Shepherd, and Alison Kamhi of the American Immigration Lawyers Association VAWA/T/U committee.

[2] Specifically, the Interim Guidance indicates that the 2021 ICE Guidance on "Using a Victim-Centered Approach with Noncitizen Crime Victims and the 2011 ICE Guidance on "Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs" have been rescinded and superseded. Note that as of the date of this publication, the ICE Factsheet on the Victim-Centered Approach Memo remains on the ICE website, replacing the word "noncitizen" with "alien."

[3] See INA 101(a)(15)(U)(U Nonimmigrant Status) and INA 101(a)(15)(T)(T Nonimmigrant Status).

[4] "See INA 214(p)(6) ("The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U)."), and 8 CFR 214.205 (T visa Bona Fide Determination Process), as well as 22 U.S.C. 7105(b)(1)(E)(i)(II)(aa)(Assistance to T visa applicants determined to have bona fide applications).

3) Instructions that ICE officers and agents are not required to affirmatively identify someone as a crime victim or consider evidence of victimization as a positive evidentiary factor; and
4) ICE will no longer routinely request expedited adjudications from USCIS but may do so on a case-by-case basis.

Additional Details and Practice Pointers

A. **Coordination with Law Enforcement**: The Interim Guidance instructs that when ICE officers are determining whether to take an enforcement action, such as arrest or detention of an immigrant, they "should coordinate and deconflict internally" with state, local or federal law enforcement agencies ("LEAs") to ensure that criminal investigative "and other enforcement actions" will not be compromised. This appears to apply to cases where a victim may be involved in an active criminal investigation or prosecution, either as a cooperating witness or defendant; however, this provision lacks clarity. It's unknown what steps ICE must take to "deconflict internally" and what may be the "appropriate" circumstances to connect with other LEAs before making an immigration enforcement action. .

Practice Pointers:

- Keep track of when a client may be involved in an active investigation or prosecution, as either a cooperating witness or defendant, and ensure that you and your client have the contact information for a person within the relevant agency involved in your case (e.g. a victim advocate), as well as their defense counsel if the survivor is charged with an offense being investigated or prosecuted. If your client is subject to an immigration enforcement action, these partners may be helpful in order to support interventions with ICE.

- .If your client is a victim-witness, they also are entitled to certain rights as crime victims that may further protect them and you should connect them to a Victims' Rights Attorney to help them enforce those rights. Additionally, trafficking survivors may request Continued Presence from LEAs which may provide protection from removal while their T visa applications are pending. We will provide further guidance as we learn more about the coordination directive.

B. **Individuals who are beneficiaries of or who are requesting victim-based benefits:** The 2021 Victim-Centered Approach Memo defined victim-based benefits as including T nonimmigrant status for victims of human trafficking, U nonimmigrant status for victims of certain qualifying criminal activity, Violence Against Women Act (VAWA) relief for qualifying domestic violence victims, as well as Special Immigrant Juvenile Classification (SIJ) for qualifying children who have been abused, neglected or abandoned by one or both parents. The Interim Guidance seems to adopt this framing of "victim-based benefits."

The Interim Guidance states ICE officers and agents ”should” consult with ICE Office of the Principal Legal Advisor (OPLA) prior to conducting a civil enforcement action against such known beneficiaries, requestors, and derivatives, to ensure actions are consistent with “legal limitations.” This means that ICE should (but is not obligated to) consult with OPLA regarding anyone known to have **approved** or **pending** victim-based benefit requests, including derivatives. This likely includes individuals who hold interim benefits like those with favorable T and U bona fide determinations (BFDs) as well as individuals on the U waiting list or those with VAWA Form I-360 approvals. Please note that individuals who have requested (and not yet received) victim-based benefits may not be legally protected from arrest and deportation. This consultation with OPLA does not mean that an enforcement action cannot be effectuated, rather, the Interim Guidance just outlines this as a procedural step.

For individuals who hold or who are applying for VAWA/T/U-based benefits, the “legal limitations” referred to in the Interim Guidance likely mean information protections under 8 U.S.C. 1367, and regulatory protections for T applicants. Cases protected by 8 U.S.C. 1367 are noted with a specific banner in DHS information systems. (SIJS classifications are not covered by these information protections). The Interim Guidance does not mention ICE’s own 2022 guidance on 8 U.S.C. 1367 policies outlining the non-disclosure and prohibited source requirements, as well as the requirements for enforcement actions at specified locations.

In addition, the recently published T regulation requires ICE to maintain a policy regarding the exercise of discretion toward all T applicants and beneficiaries (8 C.F.R. § 214.214(b)), and also provides that issuance of a BFD to T petitioners automatically stays a final order of removal until any adverse decision becomes final (8 C.F.R. § 214.205(g)).

Practice Pointers:

- If your client has a pending or approved “victim-based immigration benefit,” make sure that they have copies of their receipt, bona fide determination, or approval notices and carry any relevant work authorization on their person.

- Maintain accurate and thorough records of pending or approved victim-based applications. If ICE takes a client into custody during the course of an enforcement action not directed at them (i.e., they are a “collateral” detainee), argue that they should be released immediately, because according to the information provided in the Interim Guidance, ICE should consult with OPLA *prior* to taking enforcement actions against individuals with pending or approved victim-based benefits.

- A client with a pending or approved victim-based benefit may still be subject to an enforcement action if they have a prior order of removal, are subject to reinstatement, expedited removal, or have a criminal record. Clients with pending

applications, particularly those without a bona fide or prima facie determination, who are inadmissible (e.g. for entering without inspection), may be subject to immigration enforcement, pursuant to recently published immigration enforcement priorities. If a client has a prior order of removal, prepare a stay of removal and have the client provide the filing fee (ideally via a US Postal Service money order, which does not expire) in advance in case they are subject to an enforcement action. If your client has an ICE check-in, representatives should accompany the client, if possible.

- If enforcement occurs against an individual with an approved or pending victim-based benefit, review the action for adherence to proper procedures and requirements. If proper procedures and requirements were not followed, challenge actions through advocacy with ICE and, if necessary, litigation. (Note: we will provide additional guidance in the coming weeks as we learn more about this implementation.) Practitioners should also request a bond hearing if the survivor is not subject to mandatory detention under INA § 236(c). Even if ICE states that the survivor is subject to mandatory detention, practitioners should request a *Matter of Joseph*[5] ("*Joseph*") hearing before an Immigration Judge. The Immigration Judge will decide at the *Joseph* hearing whether the mandatory detention determination was correct.

- Remember that the recently published DOJ regulations allow Immigration Judges to exercise their discretion to terminate removal proceedings for noncitizens who are prima facie eligible for lawful status, including victim-based benefits, and the preamble to those regulations notes that the issuance of a BFD should "weigh heavily in favor of the noncitizen under the factor concerning prima facie eligibility for relief with USCIS." 89 Fed. Reg. at 46762.

C. **Individuals who are not known beneficiaries or requestors of victim-based benefits:** If an individual has not filed or received a victim-based benefit, ICE is not required to affirmatively seek to "identify indica or evidence" that a person is a victim of a crime, nor are they required to consider that evidence[6] as a positive discretionary factor in determining whether to take an enforcement action. This provision directly contradicts the previous guidance in the 2021 Victim-Centered Approach memo.

Practice Pointers:

- Although ICE is not "required" to consider evidence of victimization as a positive factor, the Interim Guidance does not *prohibit* them from doing so. If a client has

[5] 22 I&N Dec. 799 (BIA 1999).
[6] In the 2021 guidance, this included evidence like being the beneficiary of a protection order or having a letter from the HHS Office of Trafficking in Persons.

documentation of their victimization and is eligible for a victim-based benefit, you may still present it in support of a stay request and advocate for time to file the application. Asserting multiple angles from which victimization is relevant may be helpful, including (a) humanitarian considerations for the victim, (b) humanitarian considerations for the victim's family, (c) public safety considerations if the victim has reported the crime to make the community safer, and (d) administrative efficiency if the survivor has already hired you to file for survivor-based relief or taken other steps to applying for something that could lead an IJ to terminate or close proceedings. These points are relevant in any advocacy on behalf of a noncitizen applying for victim-based benefits.

- Note that the recently published DOJ regulations allow Immigration Judges to administratively close removal proceedings for noncitizens who have not yet filed victim-based immigration benefits, even if closure is opposed by OPLA.

D. **Expedited Adjudication Requests.** The Interim Guidance states that ICE will no longer request expedited adjudications, but may do so on a case-by-case basis if it is determined to be in ICE's "best interests."

Congress created victim-based immigration benefits to encourage noncitizen victims to seek assistance, report crimes committed against them, and cooperate with investigations and prosecutions, in recognition of the many barriers they may face reaching out for help. Removing individuals with pending victim-based benefit requests undermines the purpose and goals of these programs and weakens the ability of local, state, and federal law enforcement agencies, including ICE, to detect, investigate, and prosecute crimes.

Practice Pointers:

- If clients face enforcement actions, contact local ICE leadership and assert their eligibility for protection.

- Assert that Congressional intent behind victim-based benefits should inform ICE's best interests and provide specific evidence of how expedited adjudication of *your* client's application meets these aims.

- Assert that governmental interests in efficiency and reduced costs are consistent with Congressional intent behind victim-based relief, especially where a client has been granted a continuance or administrative closure so that their application can be adjudicated by USCIS.

E. 8 U.S.C. 1367 Protections

The Interim Guidance states that ICE must adhere to 8 U.S.C. § 1367 statutory obligations and DHS Guidance related to 8 U.S.C. 1367. It is important to become familiar with these information protections, including certain requirements that pertain to enforcement actions at locations where victims are likely to go.

Note that the law requires ICE agents to follow special protocols when conducting enforcement actions at specified locations to ensure information protections for survivors were not violated. See INA § 239(e). Under the law, these locations include a domestic violence shelter, a rape crisis center, supervised visitation center, family justice center, a victim services, or victim services provider, or a community-based organization; a courthouse (or in connection with that appearance of the individual at a courthouse) if the individual is appearing in connection with a protection order case, child custody case, or other civil or criminal case relating to domestic violence, sexual assault, trafficking, or stalking. If enforcement actions are carried out at these locations, then ICE must note that the enforcement actions complied with 8 U.S.C. § 1367. Existing DHS guidance strongly encourages DHS officers to exercise prosecutorial discretion favorably in cases of noncitizens encountered at these specified locations, unless other exigent circumstances or extraordinary reasons exists

Conclusion

This Interim Guidance, coupled with other recent policy shifts, such as calls for increased entanglement between ICE and local and state law enforcement, rescinding guidance regarding enforcement actions at hospitals, courthouses, social service agencies, create an increased chilling effect in victims coming forward to seek safety and help. Instead of advancing public safety, these policies embolden abusers, traffickers and perpetrators of crime, and fail to protect survivors.