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CUNY SCHOOL OF LAW

GUIDE TO COMPLETING U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS) FORMS IN THE GANG ALLEGATIONS CONTEXT

Practice Note
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INTRODUCTION

Latinx and black youth are increasingly being accused of gang affiliation at various stages of the immigration process and are being denied applications and petitions based on unsubstantiated allegations of gang affiliation.²

The Department of Homeland Security (DHS)³ may identify an applicant as a gang affiliated in multiple problematic ways.

DHS may allege gang membership based on an applicant's answers to questions on applications for immigration benefits⁴ or following a background investigation, which consists of certain criminal background and security checks, including an examination of an applicant's biometrics report.⁵ Background checks of this type may flag whether an applicant has been included in a gang database, which relies on problematic identifiers for inclusion.⁶ Experts caution that gang identifiers vary widely from one

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² NERMEEN ARASTU ET. AL., SWEPT UP IN THE SWEEP: THE IMPACT OF GANG ALLEGATIONS ON IMMIGRANT NEW YORKERS, 9, 28, 29 (May 2018) [hereinafter SWEPT UP IN THE SWEEP], http://www.thenycic.org/userfiles/file/SweptUp_Report_Final.pdf.

³ U.S. Citizenship and Immigration Services (USCIS) is a component of the Department of Homeland Security (DHS) that focuses on the administration of benefit applications. Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP) are also components within DHS that handle immigration enforcement and border security functions, respectively.

⁴ See SWEPT UP IN THE SWEEP, *supra* note 2, at 19.

⁵ See e.g., Joshua Partlow & Nick Miroff, *U.S. Gathers Data on Migrants Deep in Mexico, a Sensitive Program Trump's Rhetoric Could Put at Risk*, WASH. POST (Apr. 6, 2018), https://www.washingtonpost.com/world/national-security/us-gathers-data-on-migrants-deep-in-mexico-a-sensitive-program-trumps-rhetoric-could-put-at-risk/2018/04/06/31a8605a-38f3-11e8-b57c-9445cc4dfa5e_story.html?noredirect=on&utm_term=.98b953a7f0d1; see KRISTIN FINKLEA, CONG. RESEARCH SERV., R45292, MS-13 IN THE UNITED STATES AND FEDERAL LAW ENFORCEMENT EFFORTS 12-13 (2018), <https://crsreports.congress.gov/product/pdf/R/R45292/2>.

⁶ *Morning Edition: Sports Jersey or Gang Symbol? Why Spotting MS-13 Recruits is Tougher than it Seems*, NPR (Aug. 18, 2017), <https://www.npr.org/2017/08/18/544365061/identifying-ms-13-members> ("But experts say it's not always easy to identify who is a gang member, and who is not. And getting it wrong, students and families say, can have tragic consequences.").

place to another, evolve rapidly, are overbroad, and result in erroneous and unsubstantiated gang allegations based on a combination of racial profiling and relying on physical identifiers such as wearing a certain hat, shoe, or color, rather than evidence of criminal activity.⁷

Allegations of gang membership may arise on the basis of information gathered by immigration officers during in-person interviews.⁸ Immigration officers may observe dress, appearance, and other characteristics that in their opinion suggests an applicant could be a security threat or a person of questionable character.⁹ Tattoos in particular have been used to allege gang membership and, on that basis, deny relief.¹⁰

Because physical markers, such as tattoos and dress, and vague questioning are unreliable indicators of gang membership, it is not surprising that the U.S. Citizenship and Immigration Services (USCIS) may level allegations against individuals who have no history of gang involvement, affiliation, or association, or who may have even resisted gang recruitment and extortion or been victims of gang crimes and violence themselves.¹¹ Some individuals targeted for gang affiliation may have had family members or may have known someone who became affiliated with a gang.¹² Some individuals may have previously belonged to gangs, but they have since ceased affiliation or have collaborated as informants with law enforcement.¹³ Non-citizens who are alleged to be gang affiliated are one focus of DHS's enforcement actions and thus appear to trigger higher scrutiny by DHS to find other pretexts for denial.¹⁴

This Guide explains how gang allegations may arise or be alleged in USCIS adjudications and where to exercise caution when applying for discretionary immigration relief before USCIS. This resource can be used to prepare applicants for the

⁷ See *id.*; SWEPT UP IN THE SWEEP, *supra* note 2, at 23-26.

⁸ SWEPT UP IN THE SWEEP, *supra* note 2, at 28.

⁹ *Id.*

¹⁰ See e.g., Gary Chodorow, *Got Tattoos? U.S. Visa Officers Want to Know*, CHODOROW L. OFF. (Jan. 29, 2018) <https://lawandborder.com/got-tattoos-u-s-visa-officers-want-know>.

¹¹ See *id.* at 29; see Jonathan Blitzer, *How Gang Victims are Labelled as Gang Suspects*, NEW YORKER (Jan. 23, 2018), <https://www.newyorker.com/news/news-desk/how-gang-victims-are-labelled-as-gang-suspects>; Maria Sacchetti, *Death is Waiting For Him*, WASH. POST (Dec. 6, 2018), https://www.washingtonpost.com/graphics/2018/local/asylum-deported-ms-13-honduras/?noredirect=on&utm_term=.1c69f227e97e.

¹² SWEPT UP IN THE SWEEP, *supra* note 2, at 25.

¹³ See Hannah Dreier, *Former MS-13 Member Who Secretly Helped Police is Deported*, PROPUBLICA (Jan. 22, 2019), <https://www.propublica.org/article/ms-13-member-who-secretly-helped-police-is-deported>.

¹⁴ Laila L. Hlass, *Deportation by Any Means Necessary: How Immigration Officials are Labeling Immigrant Youth as Gang Members*, ILRC (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf; JENNIE PASQUARELLA, *MUSLIMS NEED NOT APPLY: HOW USCIS SECRETLY MANDATES THE DISCRIMINATORY DELAY AND DENIAL OF CITIZENSHIP AND IMMIGRATION BENEFITS TO ASPIRING AMERICANS 14* (Aug. 2013) [hereinafter *MUSLIMS NEED NOT APPLY*], <https://www.aclusocal.org/sites/default/files/carrp-muslims-need-not-apply-aclu-socal-report.pdf>.

type of information or documentation they may be asked about or may need to highlight in their applications or interviews depending on their individual circumstances.

Importantly, if you have any concern that you may be targeted by USCIS in this way, please consult with a lawyer *before* you submit an application to determine if you should even apply. If you have an application pending, but are concerned you may be targeted by USCIS, please consult with an attorney.

I. WHERE GANG ALLEGATIONS MAY ARISE IN USCIS ADJUDICATIONS

Allegations of gang membership can be made at various stages of applying for some form of immigration benefit with USCIS. This why it is important for applicants to understand the process of applying for certain benefits, to reflect as to how best to answer certain questions on applications, and to carefully prepare for future interviews by reviewing and by practicing answering potential questions.

Generally, when applying for an immigration benefit with USCIS, an applicant obtains an application form on the USCIS website, completes the form, and submits the form to USCIS.¹⁵ An interview may later be scheduled with the applicant.¹⁶

The USCIS forms used when applying for an immigration benefit often contain questions to help USCIS determine if applicants are inadmissible or deportable.¹⁷ Grounds of inadmissibility, codified under Section 212(a) of the Immigration and Nationality Act (INA),¹⁸ apply to people seeking admission to the United States (seeking entry or applying to seek the right to stay legally).¹⁹ Grounds of inadmissibility fall into several categories such as medical issues, criminal violations, threats to national security, economic instability, employment and labor issues, and violations of immigration regulations.²⁰ Grounds of deportability, codified under Section 237 of the INA, apply to people already who were legally “admitted” to the United States.²¹

Because most forms are designed to help USCIS assess for inadmissibility, applicants must carefully consider all grounds of inadmissibility (in addition to those listed below) and ensure they are not intentionally misrepresenting anything when seeking an immigration benefit.

¹⁵ USCIS, *Forms*, <https://www.uscis.gov/forms>.

¹⁶ 8 C.F.R. § 103.2(b)(9); USCIS, *Adjudicator’s Field Manual: Redacted Public Version 15.1, Interview Policies*, <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2449/0-0-0-2466.html> (“In accordance with 8 C.F.R. 103.2(b)(9), an applicant, a petitioner, a sponsor, a beneficiary, or other individual residing in the United States at the time of filing an application or petition may be required to appear for an interview.”).

¹⁷ See 8 U.S.C. § 1182; see 8 U.S.C. § 1127.

¹⁸ The INA sets forth grounds for inadmissibility, which include health-related grounds, criminal-related grounds, national security grounds, public charge, labor protection grounds, fraud or other immigration violations, documentation requirements, grounds relating to military service in the United States, prior removals or unlawful presence in the United States, and miscellaneous grounds. INA § 212(a). Individuals who are inadmissible are not permitted by law to enter or remain in the United States. This affects those seeking admission to the United States, those present in the United States without having been inspected and admitted, and those seeking adjustment of status or certain other immigration benefits.

¹⁹ 8 U.S.C. § 1182.

²⁰ See *id.*

²¹ 8 U.S.C. § 1127.

While there is no ground of inadmissibility in the INA that specifically bars persons who are or were gang members from being “admitted,” DHS may nevertheless argue that some inadmissibility grounds apply to alleged gang members.²²

Nevertheless, the INA confers some discretionary authority on the executive branch in immigration matters.²³ For example, immigration officials are authorized to grant certain types of benefits or relief to qualifying noncitizens, including adjustment to lawful permanent residence, another legal immigration status, change of status, or authorization to work in the United States.²⁴ Crucially, many applications, like the Form I-485, Application for Adjustment of Status (for most adjustment applicants) involve discretion,²⁵ giving USCIS wide latitude to reject applications where it lodges gang-related allegations even where it cannot prove inadmissibility.²⁶

Forms of relief from removal that have a discretionary component include asylum, temporary protected status, and cancellation of removal.²⁷ Another significant example of discretion involves an application for waiver of grounds of inadmissibility listed in INA § 212 where, in certain circumstances, even when applicants are inadmissible to the United States, they may be eligible to seek a waiver of certain grounds of inadmissibility by filing Form I-601, Application for Waiver of Grounds of

²² Despite the fact that “gang membership” in and of itself is not a grounds of inadmissibility, practitioners have reported being denied benefits where USCIS claimed individuals were “inadmissible” because “the record indicates that federal and local law enforcement have identified [the applicant] as an active MS-13 member.” See PAIGE AUSTIN ET AL., STUCK WITH SUSPICION: HOW VAGUE GANG ALLEGATIONS IMPACT RELIEF & BOND FOR IMMIGRANT NEW YORKERS 23 (2019) [hereinafter STUCK WITH SUSPICION], https://www.nyclu.org/sites/default/files/field_documents/020819-nyclu-nyic-report_0.pdf.

²³ See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012) (“A principal feature of the removal system is the broad discretion exercised by immigration officials... Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. If removal proceedings commence, aliens may seek asylum and other discretionary relief allowing them to remain in the country or at least to leave without formal removal.”).

²⁴ Kate M. Manuel & Michael John Garcia, Cong. Research Serv., R43782, *Executive Discretion as to Immigration: Legal Overview* 4 (2014), <https://fas.org/sgp/crs/homesec/R43782.pdf>.

²⁵ Not all adjustment applications involve discretion. For a full list adjustment cases that involving discretion please refer to U.S. Citizenship & Immigr. Svs., Policy Manual, *Legal Analysis and Use of Discretion*, <https://www.uscis.gov/policy-manual/volume-7-part-a-chapter-10>.

²⁶ STUCK WITH SUSPICION, *supra* note 22, at 23 (“An applicant for adjustment of status based on U-visa status was denied by USCIS in part because local law enforcement, ‘believe him to be a gang member.’ Even though the applicant denied gang membership, the court accepted as credible ‘evidence that the Applicant [had] been affiliated with a gang,’ and found that an allegation together with his criminal history were enough to outweigh the positive factors in favor of granting him LPR status in an exercise of positive discretion.”) (internal citations omitted).

²⁷ Manuel, *supra* note 24, at 2.

Inadmissibility.²⁸ The agency adjudicating the application may grant or deny an applicant's request for a waiver as a matter of discretion.²⁹

Willful Misrepresentation

Under INA § 212(a)(6)(C)(i) applicants may be rendered inadmissible if they are found to have willfully misrepresented a material fact in the process of seeking status or entry into the United States. Practitioners should argue that the government has the burden of proof by the clear and convincing evidence standard to show fraud and misrepresentation in removal proceedings that challenge inadmissibility.³⁰

It is important to caution that immigration officials may consider omitted or mistaken information as willful misrepresentation. The legal standard for a finding a willful misrepresentation of a material fact under INA § 212(a)(6)(C)(i) requires that there be a false, material representation willfully made by the individual with the intent to procure, a benefit under U.S. immigration laws.³¹ A misrepresentation is willful when it is "deliberate and voluntary."³² Knowledge of false information is necessary for willful misrepresentation.³³ A willful misrepresentation calls for "some degree of affirmative conduct;" thus, silence should not be considered a misrepresentation.³⁴ Innocent mistake, negligence, or inadvertence cannot support willfulness.³⁵ Further, misrepresentation is not deliberate and voluntary in cases where an individual expresses difficulty in completing and reviewing application forms because of a

²⁸ *Id.* at 8. Whether an applicant is eligible for a waiver depends on the immigration benefit sought, the reason for one's inadmissibility, and applicants' particular circumstances. Applicants should refer to instructions or consult their attorney to determine whether this form should be used in their circumstances. USCIS, *I-601, Application for Waiver of Grounds of Inadmissibility*, <https://www.uscis.gov/i-601>.

²⁹ See 8 C.F.R. § 212.7(d) (stating that extraordinary circumstances may still be insufficient to warrant a favorable exercise of discretion under section 212(h)(2) of the Act).

³⁰ See *Atunnise v. Mukasey*, 523 F.3d 830, 834-38 (7th Cir. 2008). For a detailed discussion regarding the government's burden of proof regarding materiality and willfulness, see *In re Tijam*, 22 I. & N. Dec. 408 (B.I.A. 1998).

³¹ 9 FAM 302.9-4(B)(4)-(5) ("The term 'willfully' as used in INA 212(a)(6)(C)(i) is interpreted to mean knowingly and intentionally, as distinguished from accidentally, inadvertently, or in an honest belief that the facts are otherwise. In order to find the element of willfulness, it must be determined that the alien was fully aware of the nature of the information sought and knowingly, intentionally, and deliberately made an untrue statement."); *In re Y-G-*, 20 I. & N. Dec. 794, 796 (B.I.A. 1994); *Mwongera v. I.N.S.*, 187 F.3d 323, 330 (3d Cir. 1999).

³² *Falaja v. Gonzalez*, 418 F.3d 889, 897-99 (8th Cir. 2005).

³³ *Ortiz-Bouchet v. U.S. Att'y Gen.*, 714 F.3d 1353, 1356-57 (11th Cir. 2013).

³⁴ *Id.*

³⁵ *Emokah v. Mukasey*, 523 F.3d 110, 117 (2d Cir. 2008) (innocent mistake, negligence or inadvertence cannot support willfulness, but where petitioner intentionally used a different name and pretended to be the wife of a wealthy businessman to obtain a visa her actions were willful.).

language barrier, even if there are inconsistencies between the application and the individual's testimony.³⁶ A harmless misrepresentation is not considered material.³⁷

Criminal and Related Grounds

Applicants with histories of justice involvement, should review the criminal grounds of inadmissibility enumerated under INA § 212(a)(2).³⁸ In general, people are inadmissible who “(1) w[ere] convicted of or admit[] to committing a ‘crime of moral turpitude’ or a controlled substance violation; (2) w[ere] convicted of two or more offenses of any type and received aggregate sentences of five or more years; (3) trafficked or assisted in the trafficking of controlled substances, or knowingly benefitted from a spouse or parent's trafficking activities; (4) [are] coming to the U.S. to engage in prostitution or commercialized vice; (5) previously departed the U.S. as a condition of receiving immunity from prosecution for a serious crime committed in the U.S.; (6) engaged in severe violations of religious freedoms as an official in a foreign government; (7) h[ave] engaged in trafficking in persons or knowingly benefitted from a spouse or parent's trafficking; or (8) h[ave] engaged in money laundering or [are] coming to the U.S. to launder money.”³⁹

If an applicant has a criminal history and consequent interaction with law enforcement, there is a possibility that the applicant has been identified as a gang affiliate even without his or her knowledge by entry into gang database.⁴⁰ Additionally, depending on the state and the exact criminal charge involved for an alleged crime, a gang enhancement or gang-related qualification may be involved.⁴¹ Indeed, “the ‘gang’ label, an unproven allegation, can trigger a series of consequences and enhancements for individuals coming into contact with police over sometimes minor violations.”⁴² The

³⁶ Xing Yang Yang v. Holder, 770 F.3d 294, 304 (4th Cir. 2014); see also Singh v. Gonzales, 413 F.3d 156, 161 (1st Cir. 2005); Falaja v. Gonzales, 418 F.3d 889, 898 (8th Cir. 2005); Oforji v. Ashcroft, 354 F.3d 609, 612 (7th Cir. 2003).

³⁷ *In re Tijam*, 22 I. & N. Dec. 408, 425 (B.I.A. 1998).

³⁸ INA § 212(a)(2).

³⁹ David Weissbrodt & Laura Danielson, Draft Chapters of the Immigration Nutshell, *Ch. 8: Grounds for Inadmissibility and Removal* (2004), <http://hrlibrary.umn.edu/immigrationlaw/chapter8.html> (citing INA § 212(a)(2)).

⁴⁰ Alice Speri, *NYPD Gang Database Can Turn Unsuspecting New Yorkers Into Instant Felons*, INTERCEPT (Dec. 5, 2018).

⁴¹ SWEPT UP IN THE SWEEP, *supra* note 2, at 49 n. 148; KISHA BIRD, DUY PHAM, & JUSTIN EDWARDS, UNJUSTICE: OVERCOMING TRUMP'S ROLLBACKS ON YOUTH JUSTICE 22 (2018), https://www.clasp.org/sites/default/files/publications/2018/10/2018.10.10_unjustice.pdf (“[D]etermining proven gang affiliation is not so simple. Police and prosecutors alike have implicated innocent people simply because somebody in their family or neighborhood was in a gang, or because they were wearing certain brands, logos, or styles. These gang enhancement laws ultimately penalize youth for environmental factors outside their control and for youth culture. Currently a majority of states have gang enhancement laws. They are not new, but they have always been problematic and threaten the security of young people of color.”) (internal citations omitted).

⁴² Speri, *supra* note 40.

gang label alone does not rise to a ground of criminal and related grounds of inadmissibility.

Security and Related Grounds

The security and related grounds of inadmissibility, INA § 212(a)(3)(A)(ii), allow immigration officials to deny entry to anyone they believe is entering the United States “solely, principally, or incidentally” to commit a crime or engage in “any other unlawful activity.”

INA § 212(a)(3)(B) excludes individuals on the basis of involvement or speculative involvement in “terrorist activities.” This extensive exclusionary list goes beyond people who actually engage in “terrorist activity.”⁴³ It includes those DHS perceives as providing material support to terrorist organizations,⁴⁴ even if minimal or if under duress.⁴⁵

INA § 212(a)(3)(B)(i)(IV-VI) deems inadmissible individuals perceived to be representatives or current members of terrorist organizations.⁴⁶ Tier I and Tier II terrorist organizations are designated by the U.S. Secretary of State and listed in the Federal Register.⁴⁷ However, Tier III organizations are “undesigned” and are defined as any group of two or more individuals who engage in “terrorist activity,” a broadly defined term under the statute.⁴⁸

INA § 212(a)(3)(F) renders inadmissible anyone who “has been associated with a terrorist organization,” and who the Attorney General and Secretary of State believes will engage in activities that will endanger the, “welfare, safety, or security of the United States.”

MS-13 was designated a transnational criminal organization (TCO) by the U.S. government in October 2012.⁴⁹ However, Former Attorney General Jeff Sessions has stated that he believes the gang “could” qualify as a foreign terrorist organization

⁴³ For the entire list of inadmissible persons and definitions of terms such as “Terrorist Activities” and “Terrorist Organization” see INA § 212(a)(3)(B)(i)-(vi).

⁴⁴ INA § 212(a)(3)(B)(iv)(VI).

⁴⁵ *In re A-C-M-*, 27 I. & N. Dec. 303, 310, 315 (B.I.A. 2018).

⁴⁶ INA §212(a)(3)(B)(i)(IV-VI); Steven H. Schulman, *Victimized Twice: Asylum Seekers and the Material-Support Bar*, 59 Cath. U. L. Rev. 949, 951 (2010) (alluding to how DHS and the BIA have interpreted the material support bar broadly to encompass asylum seekers who have been victimized by or have had only incidental contact with members of armed groups).

⁴⁷ INA § 212(a)(3)(B)(vi)(I-II).

⁴⁸ INA § 212(a)(3)(B)(vi)(III).

⁴⁹ U.S. Dep’t of Treasury, Press Center, *Treasury Sanctions Latin American Criminal Organization* (Oct. 11, 2012), <https://www.treasury.gov/press-center/press-releases/pages/tg1733.aspx> (“The U.S. Department of the Treasury today designated the Latin American gang Mara Salvatrucha, known as MS-13, pursuant to Executive Order (E.O.) 13581, which targets significant transnational criminal organizations (TCOs) and their supporters.”).

(FTO).⁵⁰ Such official classification could have a damaging effect on the ability of Central American asylum seekers to gain protection in the United States.⁵¹ At the time of this advisory gangs like MS-13 are not considered terrorist organizations in the United States. However, affected persons should carefully track any official designations regarding gangs such as MS-13.⁵²

II. POINTERS WHEN APPLYING FOR DISCRETIONARY RELIEF FROM USCIS

As stated above, when adjudicating applications with a discretionary component, USCIS can deny an application on any basis and would likely consider affiliation or loose connection to a gang as a negative factor weighing against a favorable determination. Depending on the application, USCIS may also consider factors such as whether someone poses a national security risk.

Below are suggestions and tips to successfully file for relief from USCIS. This is not an exhaustive list, but it addresses some of the major themes and issues that affect applicants who may be subject to extreme scrutiny when applying for immigration benefits and relief.

Filling Out USCIS Forms Generally

1. *Consider Risk of Exposure*

If at all possible, where an applicant is a former gang member or a member of a community targeted by gang enforcement, the applicant should discuss with an attorney whether the benefits of applying for an immigration relief outweigh the risk of exposure to possible detention and/or deportation. Applicants with gang allegations appear to trigger higher scrutiny by DHS to find other pretexts for denials, even when the gang allegation itself does not become the sole reason for denial.⁵³

⁵⁰ Jeremy Berkowitz, *Is MS-13 a Foreign Terrorist Organization?*, UTICA C. PUB. AFF. (May 20, 2017), <https://www.ucpublicaffairs.com/home/2017/5/20/is-ms-13-a-foreign-terrorist-organization-by-jeremy-berkowitz> (arguing MS-13's status should not be elevated from transnational criminal to terrorist organization); 8 U.S.C. § 1189(a)(1).

⁵¹ *Id.*; Jillian Blake, *MS-13 as a Terrorist Organization: Risks for Central American Asylum Seekers*, 116 Mich. L. Rev. Online 39, 40 (2017).

⁵² Cristiano Lima, *Sessions: MS-13 Gang Could be Labeled a Terrorist Organization*, POLITICO (Apr. 18, 2017), <https://www.politico.com/story/2017/04/sessions-salvador-gang-terrorists-237345> ("Attorney General Jeff Sessions said Tuesday the violent MS-13 gang could qualify as a terrorist organization, and that he would support a move to label it as such.") ("Carlson had asked Sessions whether the U.S. could take the same action as the government of El Salvador did in 2015, when it classified MS-13 as a terrorist organization. Sessions said the answer is yes — but noted that it is not within his jurisdiction to create the designation.").

⁵³ STUCK WITH SUSPICION, *supra* note 22, at 12.

2. *Importance of Telling the Truth*

When completing any immigration form or providing any information to any government or immigration official, it is important to be as truthful and as accurate as possible. If an applicant believes that disclosure of certain information will be detrimental, the applicant should consult an experienced immigration attorney. Submitting a document that is a lie, misrepresentation, or a fabrication may lead to the denial of the petition, application, or form, detrimentally undermine the character of an applicant, and possibly carry criminal consequences.⁵⁴ Even where the instant petition is approved, omissions and misrepresentations may have negative consequences on future adjustment or naturalization applications. Where applicants face vague questions, i.e. inquiries about “organizational affiliations” applicants should take steps to clarify their understanding of the question on the application or in the interview. Where applicants are unsure of how to answer a question, they should consider providing a brief explanation of their answer so that DHS knows that no statements were made with an intent to deceive.

3. *Obtain Your A-File*

In some instances, applicants should try to obtain their complete A-file in advance by submitting Form G-639, Freedom of Information Act (FOIA)/Privacy Act Request describing the records requested. This way the applicant has records of all previous contact, testimony, and submissions previously submitted to DHS before submitting any new USCIS forms.⁵⁵ Applicants can also submit an Executive Office for Immigration Review (EOIR) FOIA request with U.S. Department of Justice (DOJ) if applicants have ever been in removal proceedings.⁵⁶ Ideally, applicants should contact their attorneys to confirm whether such a record is needed and that requesting such a record will not be harmful to applicants given their specific situations before making any such requests.

4. *Obtain Your Criminal History Record and Driving Record*

Applicants should try to obtain their entire criminal history.⁵⁷ Due to law enforcement’s racial profiling and focus on “high crime” neighborhoods, people who have been subjected to multiple routine stops should collect their criminal records to check for accuracy and to ensure that interactions are accurately reported, if such information is required in an application form. Sometimes applicants may not realize that they were arrested or that they have been charged

⁵⁴ See e.g., *Maslenjak v. United States*, 137 S. Ct. 1918, 1927-29 (2017).

⁵⁵ 5 U.S.C. § 552/552a.

⁵⁶ EOIR, *How to Submit a FOIA/PA Request*, <https://www.justice.gov/eoir/foia-facts>.

⁵⁷ Ideally, applicants should contact their attorneys to confirm that such a record is needed and that requesting such a record will not be harmful to applicants given their specific situations *before* making any such requests. Depending on an applicant’s situation, obtaining one’s full criminal record and corresponding documentation can be a complicated process. Applicants should consult their attorneys about the best way to obtain their criminal history records for the jurisdiction(s) at issue.

with a minor criminal offense that rises to the level of conviction for immigration purposes.

In certain circumstances, applicants should try to obtain a certified copy of their “lifetime” driving record from each state where the applicant had a driving record. Obtaining one’s driving record can help shed light on any interactions with law enforcement that involved some vehicular offense.

The process for obtaining criminal history records or driving records varies by state and applicants should consult their lawyer to determine whether to obtain these kinds of records.

5. *Be Consistent*

Applicants should confirm that their answers to all application questions are consistent with any testimony previously provided in any court of law, all prior immigration and government forms, and all possible publicly searchable sources and search results (i.e. searches on Facebook, Twitter, or other social media platforms, messages exchanged via social media platform).

6. *Answer the Question Precisely*

Applicants should be mindful that some questions on applications may be fastidiously particular and other questions may be obscurely broad, such as when being asked about membership in organizations. Reflect on whether the question could be construed by USCIS to apply to gang membership or gang allegations. If unsure whether a particular fact or circumstance applies to a particular question, applicants should consult an experienced attorney. In certain circumstances, it may be worthwhile to clarify the question and its applicability on the record during an agency interview or directly on the application.

7. *Read the Question Carefully*

It is critical to read questions carefully to understand what time period the question addresses. Some questions query about relevant activity or events during a specific time period, such as from the past five years, whereas other questions query whether an applicant has ever taken part in certain activities or events. Such a temporal distinction could be vital in deciding what information an applicant is required to disclose and what information an applicant is not required to disclose.

8. *Review Instructions*

For any and all forms, consult the application form instructions. These instructions help clarify what information USCIS is seeking and explain particular questions. Each USCIS application form has its own accompanying PDF document of instructions.

9. Consult Applicable Legal Resources

For any and all forms, be sure to reference applicable laws, regulations, and other authorities, including interpretations and policies that USCIS and other immigration-related components of DHS follow. This includes consulting statutes governing immigration law in the INA, USCIS regulations in Title 8 of the Code of Federal Regulations (8 CFR), USCIS Federal Register Publications, including notices, proposed, interim, and final rules, as well as other authorities such as administrative decisions from the USCIS Administrative Appeals Office and handbooks and guides used immigration officers in performing their jobs. This is not an exhaustive list.

10. Mitigate Negative Factors

Some forms ask applicants to explain why they believe their application should be approved as a matter of discretion, with the favorable factors outweighing the unfavorable factors in an applicant's case.⁵⁸ An application eliciting favorable factors from an applicant either in the space provided on the application form or separately in a letter may direct applicants to consult application instructions for more information on discretion.⁵⁹

On forms where applicants are given opportunity to discuss discretionary factors, consider the following to mitigate any negative factors:

- Where an applicant has been targeted by law enforcement for being a gang member, is a former gang member, and/or has associated with targeted people or individuals who were gang affiliated, the applicant should consult an attorney before applying for a particular benefit.⁶⁰
- Applicants should work with their attorney to gather evidence to show the unreliability of the gang allegations leveled against them. This includes:
 - Conducting research as to whether the applicant's community has been targeted by extensive gang enforcement,
 - Objecting to evidence suggestive of gang involvement,
 - Collecting evidence to show rehabilitation or to show positive community involvement,
 - Providing information to show that membership in a gang was under duress, and
 - Relying on gang experts and witnesses, if appropriate.

Note that it may take time to research and to gather evidence.

⁵⁸ See e.g., USCIS, *Form I-191, Application for Relief Under Former Section 212(c) of the INA*, (part 8).

⁵⁹ *Id.*

⁶⁰ See e.g., Dreier, *supra* note 13 (example of former MS-13 member who having cooperated with authorities was ultimately deported after a long legal battle).

- Where there is an arrest record, conduct some research into documented incidents of over-policing in the area, especially where the applicant was arrested. Include this information in your application (where applicable) and other evidence to show the unreliability of the gang allegations.⁶¹
- Consider reaching out to local community groups who may be able to share resources about extensive gang policing or corrupt law enforcement practices near where an applicant was stopped, arrested, or otherwise targeted by law enforcement. Community groups may have collected resources, have community members already working on these issues, or be able to provide referrals to other organizations that could provide resource support.

Unfortunately, even such mitigating factors may not be sufficient for a favorable exercise of discretion, if applicants have a documented or extensive history of gang involvement.⁶²

11. *Be Prepared to be Questioned*

An applicant should be prepared to be questioned by USCIS adjudicators about gang affiliation during USCIS interviews. Review reports identifying questions from immigration judges and USCIS adjudicators that non-citizens have been asked about gang affiliation.⁶³

Questions Applicants Should Ask Themselves When Completing USCIS Forms to Help Assess Whether They May Have Been Included in a Gang Database

When applying for any immigration benefit with USCIS, assume that USCIS will receive the results of applicants' inclusion in a national and/or state or local gang database as a result of searches done as part of biometrics processing. USCIS generally will not disclose the evidence it relies upon in making a determination.

Applicants should **always consider whether there is any possibility they were included in a gang database**. Applicants should reflect on this question as broadly as possible and think of any possible way they could have been included in a gang database.⁶⁴

⁶¹ See e.g., SWEPT UP IN THE SWEEP, *supra* note 2, at 19-37.

⁶² See *id.*

⁶³ LAILA L. HLASS & RACHEL PRANDINI, DEPORTATION BY ANY MEANS NECESSARY: HOW IMMIGRATION OFFICIALS ARE LABELING IMMIGRANT YOUTH AS GANG MEMBERS 18 (2018), https://www.ilrc.org/sites/default/files/resources/deport_by_any_means_nec-20180521.pdf (listing examples of questions reported by survey respondents in *Appendix A*).

⁶⁴ A major challenge for practitioners to challenge such evidence is that USCIS generally does not disclose the evidence it relies upon and law enforcement does not disclose detailed information about what is contained in its gang databases or files. STUCK WITH SUSPICION, *supra* note 22, at 3 ("Because USCIS does not disclose the evidence it relies on in any detail, and law enforcement agencies do not

Consider the questions below to help applicants assess whether there is a risk that they have been included in a gang database.

1. Have you ever associated with gang members, alleged gang members, or persons who associate with gang members, in a public place, even briefly?
2. Have you ever been charged with a crime that was committed with other individuals?
3. Is anyone that you know and spend time with a member or alleged member of a gang? What about family members? Friends?
4. If you were ever in jail, in prison, or in immigration detention, were you ever questioned by immigration or jail/prison guards about anything having to do with gangs while you were incarcerated? How did you respond?
5. If you have ever been arrested, did anyone ever ask you about tattoos, clothing, your writing or artwork or about any potential affiliation with gang members? How did you respond?
6. If you have gone to court or have met with any immigration officials, did anyone ever ask you about tattoos, clothing, or affiliation with gang members? How did you respond? Are your tattoos, clothing, or affiliations memorialized on social media?

Note: While it is not our intention to in any way encourage the curtailing of an individual's right to choose one's own clothing or personal aesthetic, when attending immigration appointments or going to court, be mindful of your appearance.⁶⁵ Immigration officials have assumed gang membership based solely on an applicant's clothing, tattoos, piercings, or jewelry.⁶⁶ For example, some specific items that immigration officials relied on to support a finding of gang affiliation include Chicago Bulls paraphernalia, specific colors (blue, white black), Adidas hard top shoes, Nike Cortez shoes, rosary beads, plaid shirts, flat-brimmed baseball hats, and any visible tattoos.⁶⁷

disclose information contained in gang databases or files, it is impossible for practitioners to put the government's evidence before the Family Court, even though USCIS now requires the Court to consider such evidence before they will grant a SIJS application.”).

⁶⁵ See Fox News, *Cops Using Sneakers to Spot MS-13 Members, Gang Leader Says*, Fox NEWS (Sept. 29, 2017), <https://www.foxnews.com/us/cops-using-sneakers-to-spot-ms-13-members-gang-leader-says> (addressing concerns regarding police officers' use of certain identifying colors and apparel to target suspected MS-13 members).

⁶⁶ SWEPT UP IN THE SWEEP, *supra* note 2, at 33; see also STUCK WITH SUSPICION, *supra* note 22, at 21, 23.

⁶⁷ *Id.*

7. Have you ever faced any disciplinary action in school? Were you ever questioned about gang membership in school? Were you ever suspended? Were you ever asked about or accused of gang affiliation during these proceedings? Has your child ever experienced any such issues in school? Your spouse?

Note: If possible, get copies of school suspension records⁶⁸ directly from the applicant's school and ensure that the information in the records is consistent with answers to questions on any immigration forms. Check whether the school disciplinary codes with which the applicant was cited are gang-related by reviewing the school's discipline code online or contacting an education advocate.⁶⁹

III. HIGHLIGHTING QUESTIONS THAT IMPLICATE GANG MEMBERSHIP

Generally, most forms do not explicitly ask about gang membership. However, this section highlights different queries that are found on USCIS application forms that could lead to potential gang allegations. Many forms ask questions that could tangentially or directly pertain to gang involvement even if the word "gang" is not used. Criminal history and group membership questions are most related to a gang-related inquiry.

For individuals who are directly affected by gang allegations, it is important to consult an experienced immigration attorney to strategize about how to address these issues and also what degree of disclosure is required by law.

**** Important Note:** Please note that the forms are subject to change and are often updated. Please ensure you are using the most up-to-date form in your submission and review the questions included in that version. As discussed previously, for any and all forms, it is crucial to reference the application form instructions. Instructions are available on each form page as a separate PDF document from the actual application. Read the instructions and question carefully to ensure you are precisely answering the

⁶⁸ To obtain school records, practitioners should have a parent and student sign a school records release and authorization form, on practitioner's letterhead, stating that the practitioner is representing the child, and that the school is authorized to release to practitioner "any and all school records, including, but not limited to, the suspension packet, the cumulative record and all its contents, all academic records, guidance reports, anecdotal records, incident reports, attendance records, immunization and health records, special education records (if any), any records kept by the guidance counselor, and any other records maintained by the school." The records release should also state that the parents fully understands that the school is sharing confidential information with the practitioner and that the parents authorize the practitioner to inspect, examine, and obtain copies of any and all records described above.

⁶⁹ See, e.g., NYC Dep't of Educ., *Discipline Code*, <https://www.schools.nyc.gov/school-life/rules-for-students/discipline-code> (available in multiple languages); see e.g., Brentwood Union Free School District, *Code of Conduct*, <http://www.brentwood.k12.ny.us/HTMLpages/BdofEd/docs/5300.pdf>.

question on the application form. Refer to [Pointers When Applying for Discretionary Relief from USCIS](#) above for important tips. **

Criminal History Questions/ Trends

1. **Criminal Inadmissibility Grounds:** Many USCIS application forms ask applicants whether they believe they “may be inadmissible to the United States” and to provide an explanation.⁷⁰ [Criminal inadmissibility grounds](#) will or may prevent a non-citizen from being able to obtain lawful status in the United States.⁷¹ Criminal inadmissibility grounds may also prevent a non-citizen from being able to return to the United States from a trip abroad.⁷² Applicants are directed to review inadmissibility grounds in section 212(a)(2) of the INA.⁷³

Note: Applicants may also be asked whether they believe that are subjected to removal on any grounds besides the criminal convictions previously listed, which may be any inadmissibility ground in section 212 (a) of the INA or any deportability ground in section 237 (a) of the INA.⁷⁴

2. **Criminal Convictions:** Many immigration forms require applicants to disclose their criminal convictions. Refer to [Immigrant Defense Project’s Immigration Consequences of Crimes Summary Check List](#) for a helpful summary of criminal inadmissibility and deportability grounds and other implications of criminal convictions.⁷⁵ Applicants should also be aware that immigration law has its own definition of what constitutes and qualifies as a criminal “conviction,” irrespective of state law.⁷⁶

USCIS considers a foreign conviction to be a “conviction” in the immigration context if the conviction was the result of an offense deemed to be criminal by United States standards.⁷⁷

Applicants should be mindful that depending on their criminal history and the jurisdiction where criminal charges against them were filed, the criminal charges

⁷⁰ See, e.g., USCIS, *Form I-192, Application for Advance Permission to Enter as a Nonimmigrant*, (pt. 8); see also USCIS, *Form I-191, Application for Relief Under Former Section 212(c) of the INA*, (pt. 7).

⁷¹ INA § 212(a)(2).

⁷² *Id.*

⁷³ See e.g., USCIS, *Form I-191, Application for Relief Under Former Section 212(c) of the INA*, (pt. 7).

⁷⁴ See e.g., *id.*

⁷⁵ *Immigration Consequences of Crimes Summary Checklist*, IMMIGR. DEF. PROJECT (last updated June 16, 2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/Imm-Consq-checklist-2017-v3.pdf>.

⁷⁶ See INA § 101(a)(48); see KATHY BRADY, IMMIGR’T LEGAL RES. CTR., WHAT QUALIFIES AS A CONVICTION FOR IMMIGRATION PURPOSES (2018), https://www.ilrc.org/sites/default/files/resources/definition_conviction-kb-20180307.pdf.

⁷⁷ See *In re Squires*, 17 I. & N. Dec. 561 (B.I.A. 1980); see *In re McNaughton*, 16 I. & N. Dec. 569 (B.I.A. 1978).

themselves could involve a criminal code that is gang-related. This can be an easy flag for the government reviewing an applicant's application for an immigration benefit.

Broader Criminal History: Some forms may require more detailed information and specific documentation regarding an applicant's criminal history. Moreover, forms may also ask applicants not only about their own criminal history, but also of that of their family members. Below are some examples of questions relating to criminal history.

- In addition to information about criminal convictions, application forms often ask whether applicants have EVER been arrested, cited, charged, or detained for any reason by any law enforcement official.⁷⁸
- Some forms go even further and ask applicants whether they have EVER committed a crime of any kind (even if not arrested, cited, charged with, or tried for that crime).⁷⁹
- Applicants may be asked whether they were ever charged with committing any crime or offense, whether they've ever been in jail or prison, whether they've been placed in an alternative sentencing or a rehabilitative program or if they've ever received a suspended sentence, been placed on probation, or been paroled.⁸⁰
- Applicants may be asked whether they have EVER pled guilty to or been convicted of a crime or offense (even if the violation was subsequently expunged⁸¹ or sealed by the court, or if they were granted a pardon, amnesty, a rehabilitation decree, or other act of clemency).⁸²

⁷⁸ USCIS, *Form I-485, Application to Register Permanent Residence or Adjust Status*, (pt. 8) (general eligibility and inadmissibility grounds) (criminal acts and violations).

⁷⁹ *Id.*

⁸⁰ USCIS, *Form I-698, Application to Adjust Status from Temporary to Permanent Resident* (under section 245A of the INA), (pt. 3).

⁸¹ Unfortunately, a record of conviction that has been expunged does not remove the underlying conviction. See *In re Marroquin*, 23 I. & N. Dec. 705 (A.G. 2005). The Board of Immigration Appeals (B.I.A.) has held that a state court action to "expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute" has no effect on removing the underlying conviction for immigration purposes. See *Danso v. Gonzales*, 489 F.3d 709 (5th Cir. 2007); see *Elkins v. Comfort*, 392 F.3d 1159 (10th Cir. 2004). Accordingly, "[i]t remains the applicant's responsibility to obtain his or her records regardless of whether they have been expunged or sealed by the court. USCIS may file a motion with the court to obtain a copy of the record in states where the applicant is unable to obtain the record." USCIS, *USCIS Policy Manual: Chapter 2 - Adjudicative Factors* (Feb. 12, 2019), <https://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartF-Chapter2.html#footnote-22>.

⁸² USCIS, *Form I-485, Application to Register Permanent Residence or Adjust Status* (pt. 8).

- Applicants may be asked whether they have EVER been a defendant or the accused in a criminal proceeding (including pre-trial diversion, deferred prosecution, deferred adjudication, or any withheld adjudication).
 - Applicants applying for asylum are asked whether they or their family members have EVER been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States.⁸³ Then, applicants are directed to explain the circumstances for the action.⁸⁴
 - Applicants applying for Temporary Protected Status (TPS) are asked whether they have EVER or are NOW engaged in activities that could be reasonable grounds for concluding that they are a danger to the security of the United States. This question could be used against formerly or currently gang-involved persons, if deemed to be a sufficient threat.⁸⁵
3. Documentation: Answering affirmatively to certain criminal history questions (such as the ones above) requires additional explanation or documentation. For example, if applicants respond affirmatively to the above questions, applicants are generally required to provide an *explanation that includes why the applicant was arrested, cited, detained, or charged; when (date) the event occurred; and the outcome or disposition (for example, no charges filed, charges dismissed, jail, probation, community service)*.⁸⁶
- Some forms require applicants to specify if they have ever been arrested or detained by any law enforcement officer for any reason, and *if no charges were filed* to include an official statement by the arresting or detaining agency or applicable court order confirming that no charges were filed.⁸⁷
 - Some forms require applicants to specify if they have ever been arrested or detained by any law enforcement officer for any reason and *if charges were filed* or *if charges were filed without an arrest* to submit an original or court certified copy of the complete arrest record and/or disposition for each incident (for example, a dismissal order or an acquittal order).⁸⁸

⁸³ USCIS, *Form I-589, Application for Asylum and for Withholding of Removal* (pt. B, question 2).

⁸⁴ *Id.*

⁸⁵ USCIS, *Form I-821, Application for Temporary Protected Status* (pt. 7, question 9.c.).

⁸⁶ *Id.*

⁸⁷ See e.g., USCIS, *Form I-191, Application for Relief Under Former Section 212(c) of the Immigration and Nationality Act (INA)* (pts. 3, 7).

⁸⁸ *Id.*

Group Membership, Security, and Related Grounds Questions/Trends

1. Group Membership: Many forms ask about organizational membership in varying ways. Sometimes it is clear that gang membership would fall under a particular query and sometimes that inquiry is unclear. Applicants should consult with an experienced attorney to think through answering some of these questions as affirmative disclosure may not be necessary under all circumstances.
 - Applicants are asked whether they have EVER been a member of, involved in, or in any way associated with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world including any military service.⁸⁹ If one answers affirmatively, the organization, its address, the nature of the group, and the time period of membership must be indicated. In the event that one is unsure of one's answer, the form prompts the applicant to provide an explanation of the events and circumstances.⁹⁰
 - Other forms ask whether applicants have EVER served in, been a member of, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerilla group, militia, or insurgent organization.⁹¹
 - Applicants may be broadly asked whether they or any person included in the application have EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which they or any other persons used any type of weapon against any person or threatened to do so.⁹²
 - A few forms ask applicants to broadly list "all" affiliations or associations to, which they belong or belonged, in a chart. These include clubs, organizations, churches, unions, businesses, and "etc."⁹³ What "etc." includes is generally not clarified in instructions.
 - Applicants applying for asylum are required to list not only their involvement in any group or organization in their country of origin, but also their family's involvement. Information requested includes applicants' and

⁸⁹ USCIS, *Form I-485, Application to Register Permanent Residence or Adjust Status* (pt. 8).

⁹⁰ *Id.*

⁹¹ USCIS, *Form I-601A, Application for Provisional Unlawful Presence Waiver* (question 40.a.).

⁹² USCIS, *Form I-539, Application to Extend/Change Nonimmigrant Status* (pt. 4, question 9); see *Form I-601A, Application for Provisional Unlawful Presence Waiver* (limited to applicant).

⁹³ USCIS, *Form I-687, Application for Status as a Temporary Resident Under Section 245A of the INA* (question 31).

their family's level of involvement in that organization and any positions held or still held.⁹⁴

- Applicants applying for naturalization are asked to identify their membership, involvement, and association with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world.⁹⁵ They are asked to name the group, its purpose, and specify dates of membership.
4. Security & Related Inadmissibility Grounds: Many USCIS application forms ask applicants whether they believe they “may be inadmissible to the United States” and to provide an explanation.⁹⁶ Similarly to criminal inadmissibility grounds, [security and related inadmissibility grounds](#) will or may prevent a non-citizen from being able to obtain lawful admission status in the United States.⁹⁷ Applicants are directed to review inadmissibility grounds in section 212(a)(3) of the INA.⁹⁸
 5. Security and Related Associations and Activities: Some forms’ questions query membership or support of an organization that invokes a terrorism or national security ground of removability.⁹⁹ These series of questions begin by querying the applicant directly.
 - Many forms first ask applicants whether they have ever committed, threatened to commit, attempted to commit, conspired to commit, incited, endorsed, advocated, planned, or prepared any of the following: hijacking, sabotage, kidnapping, political assassination, or use of a weapon or explosive to harm another individual or cause substantial damage to property.¹⁰⁰

Even if the answer is in the negative, applicants are asked whether they have EVER participated in, or been a member of, a group or organization that did any of the activities described above.¹⁰¹

- Applicants are further asked whether they EVER provided money, a thing of value, services or labor, or any other assistance or support for an

⁹⁴ USCIS, *Form I-589, Application for Asylum and for Withholding of Removal* (pt. B).

⁹⁵ USCIS, *Form N-400, Application for Naturalization* (pt. 12, question 9).

⁹⁶ See, e.g., USCIS, *Form I-192, Application for Advance Permission to Enter as a Nonimmigrant*, (pt. 8); see also USCIS, *Form I-191, Application for Relief Under Former Section 212(c) of the INA*, (pt. 7).

⁹⁷ INA § 212(a)(3).

⁹⁸ See e.g., USCIS, *Form I-191, Application for Relief Under Former Section 212(c) of the INA*, (pt. 7).

⁹⁹ See INA § 212(a)(3).

¹⁰⁰ USCIS, *Form I-485, Application to Register Permanent Residence or Adjust Status* (pt. 8, question 48.a.).

¹⁰¹ *Id.* (pt. 8, question 48.b.).

individual, group, or organization who did any of the activities described above¹⁰² or directly for the activities¹⁰³ described above.

- Next, applicants are asked about their intent to ever engage in any of the activities listed above. Should an applicant answer affirmatively, USCIS directs the applicants to supplement their answers and explain what they did, including the dates and location of the circumstances, or what they intend to do as additional information.

6. Relatives and Associations: Some forms also query the activities and membership of applicants' close relatives.

After questioning applicants about their own membership or support of groups engaging in specific unlawful conduct, application questions may shift to ask about an applicant's association or affiliation with others engaging in such activity.¹⁰⁴

- Generally, USCIS queries whether the applicant is the spouse or child of an individual who EVER engaged in specific conduct.¹⁰⁵ The questions are largely similar to the ones asked of the applicant directly and similarly require that if there are any affirmative responses that the relationship, conduct, dates, location of the circumstances be further provided as additional information.¹⁰⁶
- On asylum applications, applicants are required to list their family's involvement in groups and organizations. Information requested includes applicants' and their family's level of involvement in that organization and any positions previously held or still held.¹⁰⁷

¹⁰² *Id.* (pt. 8, question 48.e.).

¹⁰³ *Id.* (pt. 8, question 48.d.).

¹⁰⁴ See e.g., *id.* (pt. 8, beginning with question 51).

¹⁰⁵ See e.g., *id.* (pt. 8, beginning with question 51).

¹⁰⁶ *Id.* (pt. 8, beginning with question 51).

¹⁰⁷ USCIS, *Form I-589, Application for Asylum and for Withholding of Removal* (pt. B).

IV. APPENDIX OF SELECT QUESTIONS ON SELECT USCIS FORMS POTENTIALLY IMPLICATING GANG MEMBERSHIP

Below are some common immigration forms demonstrating questions where gang membership may be implicated. Snippets of forms illustrate the kind of language used and the type of questions applicants may encounter that could implicate gang affiliation. This has been summarized in aggregate under [Highlighting Questions that Implicate Gang Membership](#), but below are examples of specific questions organized by form.

**** Important Note:** Please note that the forms are subject to change and are often updated. Please ensure you are using the most up-to-date form in your submission and review the questions included in that version. As discussed previously, for any and all forms, it is crucial to reference the application form instructions. Instructions are available on each form page as a separate PDF document from the actual application. Read the instructions and question carefully to ensure you are precisely answering the question on the application form. **

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1. [Form I-485, Application to Register Permanent Residence or Adjust Status](#)

Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) is used to adjust status to lawful permanent residency if one is in the United States and is qualified to do so.¹⁰⁸ Form I-485 does not explicitly ask about gang membership, but *Part 8. General Eligibility and Inadmissibility Grounds* asks questions that could raise concern for potential gang allegations.

Notably, the instructions to Form I-485 explicitly refer to grounds of inadmissibility that render foreign nationals ineligible for lawful permanent resident status. As such, Form I-485 focuses its questions on inadmissibility grounds, particularly querying applicants about organizational membership and criminal history. As noted in [Highlighting Questions that Implicate Gang Membership](#), many forms ask these questions.

Part 8. General Eligibility and Inadmissibility Grounds sets out asking applicants broadly about organizational and group affiliation.

Part 8. General Eligibility and Inadmissibility Grounds

1. Have you EVER been a member of, involved in, or in any way associated with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world including any military service? Yes No

If you answered "Yes" to Item Number 1, complete Item Numbers 2 - 13.b. below. If you need extra space to complete this section, use the space provided in Part 14. Additional Information. If you answered "No," but are unsure of your answer, provide an explanation of the events and circumstances in the space provided in Part 14. Additional Information.

Organization 1

2. Name of Organization

3.a. City or Town

3.b. State or Province

3.c. Country

4. Nature of Group

Dates of Membership or Dates of Involvement

5.a. From (mm/dd/yyyy)

5.b. To (mm/dd/yyyy)

Organization 2

6. Name of Organization

7.a. City or Town

7.b. State or Province

7.c. Country

8. Nature of Group

Dates of Membership or Dates of Involvement

9.a. From (mm/dd/yyyy)

9.b. To (mm/dd/yyyy)

Organization 3

10. Name of Organization

11.a. City or Town

11.b. State or Province

11.c. Country

12. Nature of Group

Dates of Membership or Dates of Involvement

13.a. From (mm/dd/yyyy)

13.b. To (mm/dd/yyyy)

Note: Prior versions of the I-485 (revised December 13, 2017) did not require that an applicant give a definitive "yes" or "no" answer to organization membership, but simply asked applicants to *list* the organizations if they thought it appropriate or necessary.

¹⁰⁸ INA § 245(a).

Form I-485 queries applicants about their criminal history under a subsection of *Part 8. General Eligibility and Inadmissibility Grounds* titled *Criminal Acts and Violations* asking applicants to detail their criminal history, question by question, and requiring any affirmative responses be further clarified and explained as additional information. This inquiry is followed by subsection *Security and Related*, which asks applicants directly about potential membership in “terrorist” related organizations and other “national security” related questions.

Part 8. General Eligibility and Inadmissibility Grounds (continued)	
Have you EVER:	
48.a. Committed, threatened to commit, attempted to commit, conspired to commit, incited, endorsed, advocated, planned, or prepared any of the following: hijacking, sabotage, kidnapping, political assassination, or use of a weapon or explosive to harm another individual or cause substantial damage to property?	<input type="checkbox"/> Yes <input type="checkbox"/> No
48.b. Participated in, or been a member of, a group or organization that did any of the activities described in Item Number 48.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
48.c. Recruited members or asked for money or things of value for a group or organization that did any of the activities described in Item Number 48.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
48.d. Provided money, a thing of value, services or labor, or any other assistance or support for any of the activities described in Item Number 48.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
48.e. Provided money, a thing of value, services or labor, or any other assistance or support for an individual, group, or organization who did any of the activities described in Item Number 48.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
49. Have you EVER received any type of military, paramilitary, or weapons training?	<input type="checkbox"/> Yes <input type="checkbox"/> No
50. Do you intend to engage in any of the activities listed in any part of Item Numbers 48.a. - 49.?	<input type="checkbox"/> Yes <input type="checkbox"/> No

In an effort to capture information about an applicant’s close associations, the next series of questions ask applicants whether they are spouses or children of individuals who EVER engaged in specific conduct. The questions are largely similar to the ones asked of the applicant directly and similarly require that if there are any affirmative responses that the relationship, conduct, dates, location of the circumstances be further added as additional information.

Are you the spouse or child of an individual who EVER:	
51.a. Committed, threatened to commit, attempted to commit, conspired to commit, incited, endorsed, advocated, planned, or prepared any of the following: hijacking, sabotage, kidnapping, political assassination, or use of a weapon or explosive to harm another individual or cause substantial damage to property?	<input type="checkbox"/> Yes <input type="checkbox"/> No
51.b. Participated in, or been a member or a representative of a group or organization that did any of the activities described in Item Number 51.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
51.c. Recruited members, or asked for money or things of value, for a group or organization that did any of the activities described in Item Number 51.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No

51.d. Provided money, a thing of value, services or labor, or any other assistance or support for any of the activities described in Item Number 51.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
51.e. Provided money, a thing of value, services or labor, or any other assistance or support to an individual, group, or organization who did any of the activities described in Item Number 51.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
51.f. Received any type of military, paramilitary, or weapons training from a group or organization that did any of the activities described in Item Number 51.a.?	<input type="checkbox"/> Yes <input type="checkbox"/> No
NOTE: If you answered “Yes” to any part of Item Number 51., explain the relationship and what occurred, including the dates and location of the circumstances, in the space provided in Part 14. Additional Information.	

Additionally, applicants are asked if they have EVER ordered, incited, called for, committed, assisted, helped with, or otherwise participated in any of the following [acts specified in additional questions].

Part 8. General Eligibility and Inadmissibility Grounds (continued)	
Have you EVER ordered, incited, called for, committed, assisted, helped with, or otherwise participated in any of the following:	
58.a. Acts involving torture or genocide?	<input type="checkbox"/> Yes <input type="checkbox"/> No
58.b. Killing any person?	<input type="checkbox"/> Yes <input type="checkbox"/> No
58.c. Intentionally and severely injuring any person?	<input type="checkbox"/> Yes <input type="checkbox"/> No
58.d. Engaging in any kind of sexual contact or relations with any person who did not consent or was unable to consent, or was being forced or threatened?	<input type="checkbox"/> Yes <input type="checkbox"/> No
58.e. Limiting or denying any person's ability to exercise religious beliefs?	<input type="checkbox"/> Yes <input type="checkbox"/> No
59. Have you EVER recruited, enlisted, conscripted, or used any person under 15 years of age to serve in or help an armed force or group?	<input type="checkbox"/> Yes <input type="checkbox"/> No
60. Have you EVER used any person under 15 years of age to take part in hostilities, or to help or provide services to people in combat?	<input type="checkbox"/> Yes <input type="checkbox"/> No
NOTE: If you answered "Yes" to any part of Item Numbers 52. - 60., explain what occurred, including the dates and location of the circumstances, in the space provided in Part 14. Additional Information.	

Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

[https://www.uscis.gov/system/files_force/files/form/i-485instr.pdf?download=1.](https://www.uscis.gov/system/files_force/files/form/i-485instr.pdf?download=1)

2. [Form I-360, Petition for Amerasian, Widow\(er\), or Special Immigrant¹⁰⁹ with Form I-485, Application to Register Permanent Residence or Adjust Status¹¹⁰](#)

Special Immigrant Juvenile Status (SIJ or SIJS) is a visa classification for persons under 21 years of age who need protection of a juvenile court because of parental abuse, abandonment, or neglect. If SIJ classification is granted, the applicant may qualify for lawful permanent status. All statutory requirements must be satisfied.¹¹¹ Gang allegations are used as a basis to deny or revoke SIJS.¹¹²

To apply for SIJS, the applicants must first go to a juvenile court¹¹³ in the state where they reside to obtain a valid judicial order establishing that 1) the applicant is under 21 years of age, 2) the applicant is unmarried, 3) the applicant is under the jurisdiction of the juvenile court, 4) reunification with one or both parents is not viable due to abuse, abandonment, or neglect, or a similar basis under the law, and 5) it is not in the applicant's best interest to be returned to his country of nationality or last residence.¹¹⁴ USCIS has argued that some juvenile courts do not have jurisdiction to issue a juvenile court order if the applicant is over 18 years of age.¹¹⁵

Once applicants have obtained a valid juvenile court order, they can petition for SIJ classification, by filing Form I-360, Petition for Amerasian, Widow(er) or Special Immigrant (Form I-360) and supporting documentation with USCIS.¹¹⁶

If an applicant has been granted a SIJ classification (which means Form I-360 petition has been approved), the minor may qualify for lawful permanent residency by filing

¹⁰⁹ For a helpful advisory pertaining to SIJS refer to STUCK WITH SUSPICION, *supra* note 22.

¹¹⁰ Form I-360, Petition for Amerasian, Widow(er), or Special Immigrant (Form I-360) forms a basis to file Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485).

¹¹¹ INA § 101(a)(27)(J); 8 C.F.R. § 204.11; USCIS, *USCIS Policy Manual, Volume 6, Part J-Special Immigrant Juveniles*.

¹¹² STUCK WITH SUSPICION, *supra* note 22, at 7; Esther Yu His Lee, *Trump Administration Reportedly Changes Rule on Green Cards That Could Affect Thousands*, THINKPROGRESS (Apr. 18, 2018), <https://thinkprogress.org/trump-administration-reportedly-denying-green-cards-sij-children-16e40ef4c5b3/>

¹¹³ "For establishing eligibility for SIJ classification, a juvenile court is a court in the United States that has jurisdiction under state law to make judicial determinations about the custody and care of children." USCIS, *Special Immigrant Juveniles*, <https://www.uscis.gov/green-card/sij>.

¹¹⁴ STUCK WITH SUSPICION, *supra* note 22, at 9 (Figure 1).

¹¹⁵ USCIS, *Special Immigrant Juveniles*, <https://www.uscis.gov/green-card/sij>. Class action lawsuits challenging USCIS's practice of denying SIJS to young people who applied when over the age of 18 are pending. Akela Lacy, *Donald Trump's Anti-Immigrant Agenda Faces Another Setback in Court*, INTERCEPT (Mar. 21, 2019), <https://theintercept.com/2019/03/21/special-immigrant-juvenile-status-trump/>. In March 2019, a federal district court concluded that the over-18 denial policy that USCIS had adopted for juvenile orders emerging out of NY State Family Courts was unlawful. *R.F.M. v. Nielsen*, 365 F.Supp.3d 350, (S.D.N.Y. Mar. 15, 2019). For anyone who believes they may fall into this category of applicants please refer to the practice advisory and helpful guide materials to ensure that your rights are preserved: <https://www.legalaidnyc.org/sijs-update>.

¹¹⁶ USCIS, *Special Immigrant Juveniles*, <https://www.uscis.gov/green-card/sij>

Form I-485.¹¹⁷ If an immigrant visa is immediately available, applicants may generally file their Form I-360 and Form I-485 at the same time.¹¹⁸ Otherwise, Form I-360 may be filed, but the applicant will have to wait to file Form I-485.¹¹⁹

USCIS has been denying or revoking SIJS petitions based on gang allegations.¹²⁰ Indeed, USCIS has denied or revoked some SIJS petitions stating that the juvenile court did not make an “informed decision” as part of the “best interest” prong and that the juvenile court would have withheld its consent for the young person to remain in the United States had it known the young person was a “gang member.”¹²¹ Effectively, USCIS claims that these minors were gang-involved and failed to inform the state court adjudicating the special findings order, thus justifying its later denial of Form I-360 under INA § 101(a)(27)(J)(iii).¹²² USCIS has also denied Form I-360 petitions because juvenile court orders (that were otherwise valid)¹²³ did not specifically address a child’s gang allegation or did not explicitly specify what arrest and gang affiliation evidence had been presented to the court.¹²⁴ In light of this, practitioners should carefully consider whether to specifically ask juvenile court judges to address a gang allegation in their Special Findings Order or whether to file any and all documents issued by immigration suggesting gang affiliation as part of the juvenile court record.¹²⁵

In many cases, gang affiliation or allegations have typically not been the only basis of denial; even so, such allegations appear to trigger higher scrutiny by USCIS to find other pretexts for denial.¹²⁶ Other alleged deficiencies of juvenile court orders have been based on, for example, an insufficient finding of “abandonment” or on the basis that the child could have returned to the home country.¹²⁷

Additionally, there is also a risk that allegations of gang involvement could lead USCIS to treat an applicant’s case as an “Egregious Public Safety” (EPS) case, which includes “known of suspected street gang members.”¹²⁸ However, such a classification is not

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ STUCK WITH SUSPICION, *supra* note 22, at 7; Esther Yu His Lee, *Trump Administration Reportedly Changes Rule on Green Cards That Could Affect Thousands*, THINKPROGRESS (Apr. 18, 2018), <https://thinkprogress.org/trump-administration-reportedly-denying-green-cards-sij-children-16e40ef4c5b3/>

¹²¹ STUCK WITH SUSPICION, *supra* note 22, at 9.

¹²² *See id.* at 9-10.

¹²³ *Id.* at 6 n. 16.

¹²⁴ *Id.* 9-10.

¹²⁵ *Id.* at 11-12 (“Some attorneys file the entire Office of Refugee Resettlement (ORR) file of children released from ORR custody in Family Court.”).

¹²⁶ *Id.* at 12; *see* MUSLIMS NEED NOT APPLY, *supra* note 14, at 45.

¹²⁷ STUCK WITH SUSPICION, *supra* note 22, at 9.

¹²⁸ USCIS, *Policy Memorandum: Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NRAs) in Cases Involving Inadmissible and Deportable Aliens*, PM-602-0050.1 6 (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

dispositive and merely *assists* in “triaging cases for investigation and issuance of NTAs.”¹²⁹

Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions for Form I-360:

https://www.uscis.gov/system/files_force/files/form/i-360instr.pdf?download=1.

¹²⁹ *Id.*

3. [Form I-539, Application to Extend/Change Nonimmigrant Status](#)

Form I-539, Application to Extend/Change Nonimmigrant Status is used when one is applying for an extension or change to their current nonimmigrant status.

Applicants are asked about participation in particular groups, units, or organizations (question 8.a.). Applicants are asked whether they or anyone else included in the application has EVER been a member of a group in which they or other persons used any type of weapon against any person or threatened to do so (question 9). These questions potentially trigger a gang-related inquiry.

<p>Have you, or any other person included on the application, EVER:</p> <p>8.a. Served in, been a member of, assisted, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia, insurgent organization, or any other armed group? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>8.b. Worked, volunteered, or otherwise served in any prison, jail, prison camp, detention facility, labor camp, or any other situation that involved detaining persons? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>9. Have you, or any other person included in this application, EVER been a member of, assisted, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
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Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

https://www.uscis.gov/system/files_force/files/form/i-539instr.pdf?download=1.

4. [Form I-589, Application for Asylum and for Withholding of Removal](#)

Form I-589, Application for Asylum and for Withholding of Removal (Form I-589) is used to apply for asylum, withholding of removal and protections under the Convention Against Torture (CAT) for non-citizens who are physically in the United States. Gang allegations can easily surface even if an asylum seeker is making a claim to asylum based on fear of gangs.

If escaping gang violence, applicants should carefully consider how to frame such persecution. Admissions made during the asylum phase may be used to implicate gang associations later. Gang violence and attempts at recruitment may also be turned against applicants to label them as gang-affiliated. Applicants should also be mindful that even victims of gang violence may be questioned about their own possible membership in a gang.¹³⁰

Applicants are asked about experiencing harm, mistreatment, threats in the past by anyone and about fearing harm or mistreatment if to return to one's home country.¹³¹

A. Have you, your family, or close friends or colleagues ever experienced harm or mistreatment or threats in the past by anyone?

No Yes

If "Yes," explain in detail:

1. What happened;
2. When the harm or mistreatment or threats occurred;
3. Who caused the harm or mistreatment or threats; and
4. Why you believe the harm or mistreatment or threats occurred.

B. Do you fear harm or mistreatment if you return to your home country?

No Yes

If "Yes," explain in detail:

1. What harm or mistreatment you fear;
2. Who you believe would harm or mistreat you; and
3. Why you believe you would or could be harmed or mistreated.

USCIS asks applicants not only about their criminal history and group involvement, but also that of their family members.¹³²

2. Have you or your family members ever been accused, charged, arrested, detained, interrogated, convicted and sentenced, or imprisoned in any country other than the United States?

No Yes

If "Yes," explain the circumstances and reasons for the action.

¹³⁰ See SWEPT UP IN THE SWEEP, *supra* note 2, at 34.

¹³¹ USCIS, *Form I-589, Application for Asylum and for Withholding of Removal*, (part 3) (questions A, B).

¹³² USCIS, *Form I-589 Application for Asylum and for Withholding of Removal* (part 3, questions 2, 3.A., and 3.B.).

Applicants are required to list not only their involvement in any “group” or “organization” in their country of origin, but also their family’s involvement. Form I-589 also asks about an applicant and the applicant’s family’s level of involvement in that organization and any positions held or still held. Persons whose history may lead to accusations about gang associations should carefully consider their answers to this question.

3.A. Have you or your family members ever belonged to or been associated with any organizations or groups in your home country, such as, but not limited to, a political party, student group, labor union, religious organization, military or paramilitary group, civil patrol, guerrilla organization, ethnic group, human rights group, or the press or media?

No Yes

If “Yes,” describe for each person the level of participation, any leadership or other positions held, and the length of time you or your family members were involved in each organization or activity.

USCIS further clarifies that it also wants to know about *current* participation in any of these organizations or groups.

3.B. Do you or your family members continue to participate in any way in these organizations or groups?

No Yes

If “Yes,” describe for each person your or your family members’ current level of participation, any leadership or other positions currently held, and the length of time you or your family members have been involved in each organization or group.

The asylum application asks applicants about being subjected to torture in their home country. Applicants may have experienced torture due to gang violence. USCIS may still query applicants about whether they are gang members themselves.

4. Are you afraid of being subjected to torture in your home country or any other country to which you may be returned?

No Yes

If “Yes,” explain why you are afraid and describe the nature of torture you fear, by whom, and why it would be inflicted.

Applicants are also asked about their, their spouse, or their children’s conduct or participation in causing harm or suffering to any person because of race, religion, nationality, membership in a particular social group, or belief in a particular political opinion.

3. Have you, your spouse or your child(ren) ever ordered, incited, assisted or otherwise participated in causing harm or suffering to any person because of his or her race, religion, nationality, membership in a particular social group or belief in a particular political opinion?

No Yes

If “Yes,” describe in detail each such incident and your own, your spouse’s, or your child(ren)’s involvement.

Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

https://www.uscis.gov/system/files_force/files/form/i-589instr.pdf?download=1.

5. Form I-821, Application for Temporary Protected Status

Form I-821, Application for Temporary Protected Status (Form I-821) provides a temporary protected status (TPS) to nationals of certain countries designated by the Secretary of Homeland Security to fall within the program. As of January 2, 2019, the countries designated for TPS are: El Salvador, Haiti, Honduras, Nepal, Nicaragua, Somalia, Sudan, South Sudan, Syria, and Yemen. On October 3, 2018, in *Ramos, et. al. v. Nielson, et al.*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018), the U.S. District Court for the Northern District of California enjoined DHS from implementing and enforcing its decision to terminate TPS for Sudan, Nicaragua, Haiti, and El Salvador pending further resolution of the case.¹³³ On March 1, 2019 USCIS had announced that it has automatically extended TPS for beneficiaries from Sudan, Nicaragua, Haiti and El Salvador through January 2, 2020.¹³⁴ The TPS designation has also been extended for South Sudan through November 3, 2020.¹³⁵ However, applicants should check on the current status of TPS to their designated country before submitting an application.

TPS is a temporary benefit that does not lead to lawful permanent resident status; however, once granted TPS, a person cannot be detained by DHS on the basis of his or her immigration status in the United States.¹³⁶ Under eligibility standards, USCIS asks applicants about criminal history and human rights violations. To be eligible for TPS, a non-citizen must be admissible to the United States, with certain exceptions. The instructions on the form explicitly state that the immigration and criminal history questions will help USCIS determine TPS eligibility.

Your Immigration and Criminal History

To be eligible for TPS, you must be **admissible as an immigrant to the United States**, with certain exceptions. The questions below and your responses to these questions will help USCIS determine if you are eligible for TPS. See the **Who Is Eligible for TPS** section of the Instructions for additional information on admissibility and available waivers.

If any of the questions apply to you, please provide information about the events, including the places and dates of occurrence. Provide a full explanation of the circumstances related to the specific event. If you need additional space to respond to a question, use the space provided in **Part 11. Additional Information**.

¹³³ *Ramos, et. al. v. Nielson, et al.*, No. 18-cv-01554 (N.D. Cal. Oct. 3, 2018).

¹³⁴ Approved Forms to Demonstrate Continuation of Lawful Status and TPS-Related Employment Authorization, 84 Fed. Reg. 7106 (Mar. 1, 2019), <https://www.federalregister.gov/d/2019-03783/p-64>.

¹³⁵ USCIS, *Temporary Protected Status*, <https://www.uscis.gov/humanitarian/temporary-protected-status>.

¹³⁶ *Id.*

Detailed information and supporting documentation is required for criminal offenses. Even if someone was not charged with a crime or offense, but was arrested or detained, a statement or additional documentation is required as evidence.

Criminal Offenses

If you were **EVER** arrested or detained for an offense, you must provide information about the event regardless of the country where the event occurred. If you were arrested, charged, or convicted for an offense, you must provide certified court dispositions showing the court proceedings' outcome wherever possible. You also must provide copies of arrest reports, statements of charges, indictment information, or any other charging document issued against you. If you were not charged with any crime or offense, provide a statement or other documentation from the arresting authority or prosecutor's office to show that you were not charged with any crime or offense.

NOTE: If you are not able to provide the documentation requested above, provide a signed statement as to why you cannot provide such documentation. USCIS usually needs supporting documentation, however, we do recognize that country conditions in certain TPS-designated countries may not allow an applicant to obtain the documents. Each statement will be carefully reviewed by USCIS, and we may need to ask you for additional information.

Please carefully read **Item 6** in the **General Requirements** section of the Instructions for additional information that you must provide if official documents regarding your criminal history are not available to you.

Similarly, additional detail is required if with the applicant was ever connected to any human rights violations.

Human Rights Violations

If you have ever engaged in, ordered, incited, assisted, or otherwise participated in any human rights violations, you must provide information about the events, including the place and date, and a description of the event regardless of the country where the events occurred.

The form asks "yes" or "no" questions regarding convictions inside and outside the United States, and about committing serious nonpolitical crimes outside the United States.

The form extensively queries about applicants' criminal history.

Applicants are asked whether they have **EVER** or are **NOW** engaged in activities that could be reasonable grounds for concluding that they are a danger to the security of the

United States. This question could be used against formerly or currently gang-involved persons, if deemed to be a sufficient threat.¹³⁷

Part 7. Eligibility Standards (continued)	
8.c. Any particularly serious crime committed either in or outside the United States?	<input type="checkbox"/> Yes <input type="checkbox"/> No
9.a. Have you EVER ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion?	<input type="checkbox"/> Yes <input type="checkbox"/> No
9.b. Have you EVER committed serious nonpolitical crimes outside of the United States prior to your arrival in the United States?	<input type="checkbox"/> Yes <input type="checkbox"/> No
9.c. Have you EVER or are you NOW engaged in activities that could be reasonable grounds for concluding that you are a danger to the security of the United States?	<input type="checkbox"/> Yes <input type="checkbox"/> No
Have you EVER been convicted of or have you EVER committed acts which constitute the essential elements of:	
10.a. A crime (other than a purely political offense)?	<input type="checkbox"/> Yes <input type="checkbox"/> No

There are also additional questions regarding membership in certain groups and criminal activity.

Part 7. Eligibility Standards (continued)	
Have you EVER:	
31.a. Served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerrilla group, militia, or insurgent organization?	<input type="checkbox"/> Yes <input type="checkbox"/> No
31.b. Served or worked in any prison, jail, prison camp, detention facility, labor camp, or any other situation that involved detaining persons?	<input type="checkbox"/> Yes <input type="checkbox"/> No
32. Have you EVER been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so?	<input type="checkbox"/> Yes <input type="checkbox"/> No
33. Have you EVER assisted with or participated in selling or providing weapons to any person who to your knowledge used them against another person, or in transporting weapons to any person who to your knowledge used them against another person?	<input type="checkbox"/> Yes <input type="checkbox"/> No
34. Have you EVER received any type of military, paramilitary, or weapons training?	<input type="checkbox"/> Yes <input type="checkbox"/> No

Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

https://www.uscis.gov/system/files_force/files/form/i-821instr.pdf?download=1.

¹³⁷ USCIS, *Form I-821, Application for Temporary Protected Status* (pt. 7, question 9.c.).

6. Form I-821D, Consideration for Deferred Action for Childhood Arrivals

Form I-821D, Consideration for Deferred Action for Childhood Arrivals (Form I-821D) is a request for USCIS's discretionary determination in granting or renewing deferred action for childhood arrivals.

Deferred Action for Childhood Arrivals (DACA) is an immigration option for undocumented immigrants who came to the United States before the age of 16.¹³⁸ Although DACA does not provide a pathway to lawful permanent residence, it does provide temporary protection from deportation, work authorization, and the ability to apply for a social security number.¹³⁹ On September 5, 2017 the Trump Administration announced the termination of the program which resulted in several lawsuits challenging these the termination.¹⁴⁰ USCIS continues to accept and process renewal applications while the cases are pending.¹⁴¹ **However, USCIS is not accepting requests from persons who have never before been granted deferred action under DACA.**¹⁴² Individuals who are given deferred action are generally not supposed to be placed in removal proceedings or removed from the United States for a specified period of time.¹⁴³

In order to qualify for DACA, one must be under 31 years of age as of June 15, 2012, must have come to the United States before reaching their 16th birthday, must have continuously resided in the United States since June 15, 2007, must have been present in the United States on June 15, 2012, must have had no lawful status on June 15, 2012, must be in school (graduated or GED works as well) or an honorably discharged veteran of the U.S. Armed Forces or Coast Guard, and must not have been convicted of a felony, significant misdemeanor, three or more misdemeanors or otherwise pose a threat to national security.¹⁴⁴

Form I-821D has a series of questions relating to criminal history, national security, and public safety information. **However, this form is one of the very few to refer to gang membership explicitly.**

¹³⁸ Dep't of Homeland Security, *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children 1*, USCIS (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

¹³⁹ Immigr't Legal Res. Ctr., *DACA*, <https://www.ilrc.org/daca>.

¹⁴⁰ Dep't of Homeland Security, *Memorandum on Rescission of Deferred Action for Childhood Arrivals (DACA)* (Sep. 5, 2017), <https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca>; National Immigration Law Center, *Status of Current DACA Litigation* (Feb. 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation>.

¹⁴¹ Nat'l Immigr. L. Ctr, *Status of Current DACA Litigation* (Feb. 7, 2019), <https://www.nilc.org/issues/daca/status-current-daca-litigation>.

¹⁴² USCIS, *Consideration of Deferred Action for Childhood Arrivals (DACA)*, <https://www.uscis.gov/archive/consideration-deferred-action-childhood-arrivals-daca>

¹⁴³ *Id.*

¹⁴⁴ *Id.*

Applicants are asked explicitly whether they now or have EVER been members of a gang.¹⁴⁵ While other forms refer to “organizations” or “groups”, this explicit reference to gangs in an anomaly.

Like other forms, applicants are asked about their criminal history, including incidents handled in juvenile court in the United States.

<p>Part 4. Criminal, National Security, and Public Safety Information <i>(For Initial and Renewal Requests)</i></p> <p>If any of the following questions apply to you, use Part 8. Additional Information to describe the circumstances and include a full explanation.</p> <p>1. Have you EVER been arrested for, charged with, or convicted of a felony or misdemeanor, including incidents handled in juvenile court, in the United States? Do not include minor traffic violations unless they were alcohol- or drug-related. <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If you answered “Yes,” you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest, unless disclosure is prohibited under state law.</p> <p>2. Have you EVER been arrested for, charged with, or convicted of a crime in any country other than the United States? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>If you answered “Yes,” you must include a certified court disposition, arrest record, charging document, sentencing record, etc., for each arrest.</p> <p>3. Have you EVER engaged in, do you continue to engage in, or plan to engage in terrorist activities? <input type="checkbox"/> Yes <input type="checkbox"/> No</p> <p>4. Are you NOW or have you EVER been a member of a gang? <input type="checkbox"/> Yes <input type="checkbox"/> No</p>
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Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

https://www.uscis.gov/system/files_force/files/form/i-821dinstr.pdf?download=1.

¹⁴⁵ USCIS, *Form I-821D, Consideration of Deferred Action for Childhood Arrivals* (pt. 4, question 4).

7. Form I-918, Petition for U Nonimmigrant Status

Form I-918, Petition for U Nonimmigrant Status (Form I-918) is an application to provide temporary immigration benefits to foreign nationals who are victims of “qualifying criminal activity,”¹⁴⁶ and to their qualifying family members, as appropriate.

When applying for U Nonimmigrant status, applicants must submit a completed Supplement B Certification, which requires a certifying official to determine that the U applicant was, is, or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity, has information concerning criminal activity, and was a victim of the qualifying criminal activity.¹⁴⁷ The petitioner must have also suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity.¹⁴⁸ After having been certified by a federal, state, or local government official investigating the qualifying criminal activity, the Supplemental B Certification is submitted along with the applicant’s Form I-918.¹⁴⁹ Evidence supporting the information Supplemental B must be provided along with Form I-918.

Part 3. Processing Information
Answer the following questions about yourself. For the purposes of this petition, you must answer "Yes" to the following questions, if applicable, even if your records were sealed or otherwise cleared or if anyone, including a judge, law enforcement officer, or attorney, told you that you no longer have a record.
NOTE: If you answer "Yes" to ANY question in Part 3., provide an explanation in the space provided in Part 8. Additional Information.
NOTE: Answering "Yes" does not necessarily mean that U.S. Citizenship and Immigration Services (USCIS) will deny your Petition for U Nonimmigrant Status.
Have you EVER:
1.a. Committed a crime or offense for which you have not been arrested? <input type="checkbox"/> Yes <input type="checkbox"/> No
1.b. Been arrested, cited, or detained by any law enforcement officer (including Department of Homeland Security (DHS), former Immigration and Naturalization Service (INS), and military officers) for any reason? <input type="checkbox"/> Yes <input type="checkbox"/> No
1.c. Been charged with committing any crime or offense? <input type="checkbox"/> Yes <input type="checkbox"/> No
1.d. Been convicted of a crime or offense (even if the violation was subsequently expunged or pardoned)? <input type="checkbox"/> Yes <input type="checkbox"/> No

Information About Arrests, Citations, Detentions, or Charges
If you answered "Yes" to any of the above questions, respond to the questions below to provide additional details. If you need extra space, use the space provided in Part 8. Additional Information.
2.a. Why were you arrested, cited, detained, or charged? <input type="text"/>
2.b. Date of arrest, citation, detention, or charge (mm/dd/yyyy) <input type="text"/>
Where were you arrested, cited, detained, or charged?
2.c. City or Town <input type="text"/>
2.d. State <input type="text"/>
2.e. Country <input type="text"/>
2.f. Outcome or disposition (for example, no charges filed, charges dismissed, jail, probation) <input type="text"/>

¹⁴⁶ USCIS, *I-918, Petition for U Nonimmigrant Status*, <https://www.uscis.gov/i-918>.

¹⁴⁷ USCIS, *Instructions for Petition for U Nonimmigrant Status and Supplement A, Petition for Qualifying Family Member of U-1 Recipient*, https://www.uscis.gov/system/files_force/files/form/i-918instr.pdf?download=1. The principal applicants must demonstrate that they are victims of criminal activity designated in INA § 101(a)(15)(U)(iii) or similar activity in violation of Federal, state, or local criminal law. *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

Applicants are also asked some questions pertaining to group membership.

Have you EVER:

13.a. Served in, been a member of, assisted in, or participated in any military unit, paramilitary unit, police unit, self-defense unit, vigilante unit, rebel group, guerilla group, militia, or other insurgent organization? Yes No

13.c. Served in, been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons transported, possessed, or used any type of weapon? Yes No

NOTE: If you answered "Yes" to any question in Item Numbers 13.a. - 13.c., please describe the circumstances in Part 8. Additional Information.

Have you EVER:

14.a. Received any type of military, paramilitary, or weapons training? Yes No

14.b. Been a member of, assisted in, or participated in any group, unit, or organization of any kind in which you or other persons used any type of weapon against any person or threatened to do so? Yes No

14.c. Assisted or participated in selling or providing weapons to any person who to your knowledge used them against another person, or in transporting weapons to any person who to your knowledge used them against another person? Yes No

NOTE: If you answered "Yes" to any question in Item Numbers 14.a. - 14.c., please describe the circumstances in Part 8. Additional Information.

Notably, there have been instances where applicants applying for derivative U-visa status in New York have faced gang allegations in the form of a Request for Evidence (RFE) on Form I-912, Application for Advanced Permission to Enter as a Nonimmigrant "seeking extensive information about his alleged gang involvement."¹⁵⁰

Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

<https://www.uscis.gov/sites/default/files/files/form/i-918instr.pdf>.

¹⁵⁰ STUCK WITH SUSPICION, *supra* note 22, at 23.

8. Form N-400, Application for Naturalization

Form N-400 is used to apply to become a United States citizen.

Applicants are asked broadly about their membership, involvement, and association with any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world.¹⁵¹

9. A. Have you **EVER** been a member of, involved in, or in any way associated with, any organization, association, fund, foundation, party, club, society, or similar group in the United States or in any other location in the world? Yes No

B. If you answered "Yes," provide the information below. If you need extra space, attach the names of the other groups on additional sheets of paper and provide any evidence to support your answers.

Name of the Group	Purpose of the Group	Dates of Membership	
		From (mm/dd/yyyy)	To (mm/dd/yyyy)

Form N-400 asks about membership in specific groups.

10. Have you **EVER** been a member of, or in any way associated (either directly or indirectly) with:

A. The Communist Party? Yes No

B. Any other totalitarian party? Yes No

C. A terrorist organization? Yes No

11. Have you **EVER** advocated (either directly or indirectly) the overthrow of any government by force or violence? Yes No

12. Have you **EVER** persecuted (either directly or indirectly) any person because of race, religion, national origin, membership in a particular social group, or political opinion? Yes No

Form N-400 continues to ask applicants detailed questions regarding group membership and conduct. Applicants are asked about ever helping specific groups, including police units.

15. Were you **EVER** a member of, or did you **EVER** serve in, help, or otherwise participate in, any of the following groups:

A. Military unit? Yes No

B. Paramilitary unit (a group of people who act like a military group but are not part of the official military)? Yes No

C. Police unit? Yes No

D. Self-defense unit? Yes No

E. Vigilante unit (a group of people who act like the police, but are not part of the official police)? Yes No

F. Rebel group? Yes No

G. Guerrilla group (a group of people who use weapons against or otherwise physically attack the military, police, government, or other people)? Yes No

H. Militia (an army of people, not part of the official military)? Yes No

I. Insurgent organization (a group that uses weapons and fights against a government)? Yes No

¹⁵¹ Form N-400.

Similarly to other forms, applicants are asked about being a part of a group or ever helping any group that used a weapon against any person, or threatened to do so.

17. Were you EVER a part of any group, or did you EVER help any group, unit, or organization that used a weapon against any person, or threatened to do so? Yes No

A. If you answered "Yes," when you were part of this group, or when you helped this group, did you ever use a weapon against another person? Yes No

B. If you answered "Yes," when you were part of this group, or when you helped this group, did you ever tell another person that you would use a weapon against that person? Yes No

Applicants are queried about their criminal history. Disclosure is required even if records were sealed, expunged, or otherwise cleared. It is important for applicants to collect certificates of disposition for every arrest. Request *Decline to Prosecute* letters if charges were dropped by the District Attorney.

If any of Item Numbers 22. - 28. apply to you, you must answer "Yes" even if your records have been sealed, expunged, or otherwise cleared. You must disclose this information even if someone, including a judge, law enforcement officer, or attorney, told you that it no longer constitutes a record or told you that you do not have to disclose the information.

22. Have you EVER committed, assisted in committing, or attempted to commit, a crime or offense for which you were NOT arrested? Yes No

23. Have you EVER been arrested, cited, or detained by any law enforcement officer (including any immigration official or any official of the U.S. armed forces) for any reason? Yes No

24. Have you EVER been charged with committing, attempting to commit, or assisting in committing a crime or offense? Yes No

25. Have you EVER been convicted of a crime or offense? Yes No

26. Have you EVER been placed in an alternative sentencing or a rehabilitative program (for example, diversion, deferred prosecution, withheld adjudication, deferred adjudication)? Yes No

27. A. Have you EVER received a suspended sentence, been placed on probation, or been paroled? Yes No
 B. If you answered "Yes," have you completed the probation or parole? Yes No

28. A. Have you EVER been in jail or prison? Yes No
 B. If you answered "Yes," how long were you in jail or prison? Years Months Days

29. If you answered "No" to ALL questions in Item Numbers 23. - 28., then skip this item and go to Item Number 30.
 If you answered "Yes" to any question in Item Numbers 23. - 28., then complete this table. If you need extra space, use additional sheets of paper and provide any evidence to support your answers.

Why were you arrested, cited, detained, or charged?	Date arrested, cited, detained, or charged. (mm/dd/yyyy)	Where were you arrested, cited, detained, or charged? (City or Town, State, Country)	Outcome or disposition of the arrest, citation, detention, or charge (no charges filed, charges dismissed, jail, probation, etc.)

Refer to Immigrant Defense Project's *Advisory for Lawyers: Naturalization Considerations for People with Prior Law Enforcement Contacts*, which contains a helpful *Lawyers' Naturalization Checklist for Criminal History Issues* helping applicants address justice involvement on naturalization applications.¹⁵²

Note: For any and all forms, it is necessary to consult the form instructions. This can help you understand the questions being asked. Each form has its own PDF document of instructions, and this PDF is usually provided right below the PDF of the form itself.

Link to the most updated instructions:

<https://www.uscis.gov/sites/default/files/files/form/n-400instr.pdf>.

¹⁵² Immigr. Defense Project, *Advisory for Lawyers: Naturalization Considerations for People with Prior Law Enforcement Contacts* (2017), <https://www.immigrantdefenseproject.org/wp-content/uploads/IDP-Natz-Advisory-for-lawyers-FINAL-June-2017.pdf>.