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BY KENDALL NILES, VERONICA THRONSON, AND LESLYE ORLOFF

As an important part of the Violence Against Women Act (VAWA) of 2000 Congress created the U visa to offer immigration relief and protection from deportation for immigrant crime victims who muster the courage to come forward and avail themselves of help from the criminal and civil justice systems. Significant bipartisan efforts resulted in the creation of the U visa in 2000 as well as improvements to the U visa program included in congressional amendments as part of VAWA reauthorizations in 2005 and 2013.

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This article discusses the role that Congress created for state and federal court judges as U visa certifiers and the US Department of Homeland Security’s (DHS) implementation and articulation of this statutorily created role. First, this article provides an overview of the eligibility requirements, the application and adjudication process, and the benefits that it provides to victims of qualifying criminal activity. It contextualizes the U visa by addressing its legislative history and congressional intent.

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U VIA OVERVIEW

The U visa is the product of a bipartisan effort in Congress to create both a crime-fighting tool and humanitarian relief for crime victims.

Legislative History and Purpose

Upon introducing VAWA 2000, then-Sen. Joe Biden (D-Del.) stated:

"...I propose the single most important provision we add to the Violence Against Women Act is the battered women immigrants provisions. This strengthens and refines the protections for battered immigrant women in the original act and eliminates the unintended consequence of subsequent charges in immigration law to ensure that abused women living in the United States with immigrant victims are brought to justice and the battered immigrants also escape abuse without being subject to other penalties."

When Congress included the U visa as Section 1513 of the VAWA 2000, it chose to formally include in the statute a legislative code section that explicitly stated the congressional intent of this important bipartisan effort. Section 1513(a) provides the cornerstone of the U visa legislative history stating:

PROTECTION FOR CERTAIN CRIME VICTIMS INCLUDING VICTIMS OF CRIMES AGAINST WOMEN. (a) FINDINGS AND PURPOSE—

(1) FINDINGS.—Congress makes the following findings:

(A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including..."
If the under the age of 16 or unable to provide information due to a disability, incapacity, or incompetence, a parent, guardian, or next friend may possess the information about the crime and provide it on the victim's behalf.  

The victim was helpful, is helpful, or is likely to be helpful to government officials in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity of which the immigrant is a victim.

If under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the crime or his or her behalf.

Each U visa application must include a certification from one of the government officials authorized by DHS corroborating the victim's helpfulness.

The crime occurred in the United States or violated U.S. laws.

Additionally, the victim must prove the following to DHS:

- The victim has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.
- The victim is admissible to the United States.
- If the victim is not admissible, the victim may apply for an inadmissibility waiver from DHS as part of the U visa application.

The primary purpose is to encourage reporting of criminal activity.

The term "helpfulness" has a broad definition and can take numerous forms. A petitioner meets this requirement by providing information and assistance reasonably requested by law enforcement or prosecution.

Once a victim has been helpful or offered helpfulness, certification is available for the victim even if the case is dismissed, does not go to trial, the defendant pleads guilty, police do not take the case to prosecution, the prosecutor chooses not to prosecute, or the victim is not called as a witness if there is a trial. Further, "(law enforcement agencies) can sign a certification even if no prosecution, arrest, or conviction has been made, and even if the case is closed. Formal charges or the launch of a formal investigation is not required."

A completed U visa certification Form I-918 Supplement B must be submitted not as a required piece of evidence in the victim's U visa application. Applications filed without certifications will be rejected as incomplete. The I-918 Supplement B certification form alone does not grant any immigration benefit.

Signing a certification is not an adjudication of the U visa. In DHS's Resource Guide for government U visa certifiers, DHS states that Supplement B is "a required piece of evidence to help demonstrate that:"

- Qualifying criminal activity has occurred;
- The victim has information about the criminal activity;
- The victim was helpful, is being helpful, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of criminal activity.

The certification does not guarantee that the U visa petition will be approved by USCIS.

Likewise, the certification is not conclusive evidence of eligibility for the U visa.

In addition, the DHS Resource Guide states that

Without a completed and signed U visa certification, the victim will not qualify for a U visa as it is a required part of the application, and there is no exception to this requirement. However, by signing a U visa certification, the certifying agency, official, or judge is not sponsoring or endorsing the victim for a U visa, and the completed certification does not guarantee that USCIS will approve the U visa petition. USCIS considers the U visa as only one part of the evidence in support of the U visa petition. USCIS determines the victim's credibility and whether to approve the petition based on the totality of the evidence and circumstances of each case.

**Federal and State Roles**

The U visa scheme that Congress created establishes distinct roles for federal and state officials. Generally, the federal government had broad power over US immigration law under the US Constitution. "Federal governance over immigration and alien status is extensive and complex."

But this comprehensive federal role in adjudicating immigration matters does not mean that other persons and institutions have no role. State officials, including judicial officers, police, and prosecutors, often play a supporting, but central and formal, role in the federal adjudication of U visa applications.

As analyzed more fully in the following sections, government agencies and judicial officers who have authority under federal law to sign certifications are not legally required to sign a certification and whether to certify is at the discretion of each certifying agency or judicial officer. The certifying agency should make certification determinations on a case-by-case basis while remaining consistent with congressional purpose (US law), and DHS regulations and policies. Although there is no legal obligation for a certifying officer or agency to complete a certification, it is important to consider that without a certification, any U visa application filed will be rejected by USCIS as incomplete because the filing did not include the required certification. In many cases, the helpfulness of the victim is well-established in the evidence of the case and uncontested. However, the formality of a signed certification is required for USCIS to consider a U visa application complete.

"Helpfulness" has a broad interpretation.

The certifier is not liable for a victim's future conduct or criminal actions. By signing the certification the certifier is not vouching for the victim's character. A certifier may also withdraw or rescind a certification at any time after signing if the victim unreasonably refuses to continue to cooperate. Without the certification, the federal process is undermined and the goals of the federal legislation are superseded.

DHS officials charged with implementing US immigration laws are best positioned to see the entire U visa application process and its various components. They are the experts on VAWA's protections for immigrant victims of crime including the U visa protections for victims of criminal activity. The complexity of US immigration laws is enhanced in those areas of immigration law in which implementing regulations have not kept up with subsequent statutory reforms. The VAWA immigration provisions, including the U visa are excellent examples of this problem. To address emerging needs for victim protection and enhance the effectiveness of criminal investigations and prosecutions of perpetrators of crimes against immigrants, Congress has, over the course of more than two decades, made improvements to VAWA's crime victim protections. VAWA's immigration
protections, which were originally enacted in 1994, have been amended, first in 1995 and then three more times as part of the Violence Against Women Acts of 2005, 2008, and 2013. These amendments included the creation of the U visa in 2000 and improvements to the U visa's statutory protections in 2005 and 2013.

As immigration statutes are amended, often portions of DHS's implementing regulations are overhauled by statute, and it can take many years for DHS to issue new regulations to reflect statutory changes that have been enacted in the intervening years since the original regulations were published. To address this issue, DHS issues policy guidance, adjudicator's field manuals, and publications designed to implement statutory reforms while DHS is in the process of updating its regulations. The U visa and the VAWA self-petitioning programs are two examples of areas of immigration law in which policy memos and DHS publications fill the gaps in implementing the VAWA self-petitioning and U visa program's most recent statutory changes governing adjudications of VAWA and U visa immigration cases while the regulations are being updated.

**Signing a certification is not an adjudication of status.**

When the intent of Congress is clear, courts will apply the plain meaning rule of statutory interpretation; however, when congressional intent is unclear, courts will defer to the relevant federal agency. With regard to U visa certification, the U visa statutes list judges as one of the government agencies authorized to sign U visa certifications. However, the statute itself provides little additional clarifying guidance to certifiers, leaving many ambiguities on the U visa certification process and requirements. DHS, the agency charged with implementing the U visa certification and the U visa program, has issued regulations, policies, and publications that provide courts and certifying agencies answers to myriad questions that typically arise in relation to the U visa and U visa certification.

**Two-Prong Test**

In Cherven, the US Supreme Court created a two-prong test to determine when courts should defer to an agency's interpretation of a statute. First, the court has to determine whether the statutory language in question is ambiguous and should apply the plain meaning of the language if it determines that the language is not ambiguous, irrespective of the agency's interpretation. If the court determines that the statutory language in question is ambiguous, it must defer to the agency's interpretation so long as it is a reasonable one. Thus, the Supreme Court ruled in favor of giving deference in statutory interpretation, when the intent of Congress is unclear, to the administrative agency tasked with enforcing the legislation. The Court stated:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Cherven deference is not a broad grant of deference to federal agency interpretations of ambiguous statutes. Deference must be given only in instances in which the ambiguity "constitutes an implicit delegation from Congress to the agency to fill in statutory gaps." Deference to Congress can "[b]e shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent." A certifying judge is not sponsoring or endorsing a visa.

**Examples of "helpfulness" include calling 9-1-1 to report a crime.**

**Judges as Certifiers**

The complex statutory, regulatory, and policy web related to U visas has made it difficult for many state and federal courts issuing rulings regarding U visa certification to issue opinions that are fully and accurately reflect the laws governing the U visa program that are fully consistent with the congressional intent reflected in the statute and DHS expertise published in the regulations, policies, and publications. As a result, when state and federal courts have issued opinions discussing U visa certification and the U visa program, the court's decisions often contain legal inaccuracies about the federal immigration laws that govern the U visa program. The national review of U visa case law discussed in this article uncovers a number of areas in which state and federal courts decisions conflict with federal immigration laws, and DHS regulations, policies, and views on U visa certification. Misinterpretations of federal U visa immigration law contained in court opinions in some, but not all instances, have caused courts to reach decisions that are either inconsistent with or contrary to the U visa statute and its legislative and regulatory history. In several cases involving U visas, immigration laws are dicta in court opinions. When courts include legal inaccuracies about the U visa program in their opinions, other courts cite those opinions and the dicta they contain and rely on them as accurate statements about U visa laws. This pattern becomes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and undermines both the crime fighting and the victim protection goals of the Violence Against Women Acts enacted over a period of more than two decades.

**Certification Is Not Adjudication**

In several cases from jurisdictions nationally, courts have misconstrued judicial certification as an adjudication of the underlying immigration applications. For example, in Agapito-Palacios v. Dir., the Court concluded that the act of certifying overall eligibility of the applicant for a U visa. The Agapito-Palacios Court correctly recognized that its decision "does not extend so far as to confer further jurisdiction over questions of Plaintiff's eligibility for a U-Visa under 8 U.S.C. § 1101(a) (15)(U). The United States Citizenship and Immigration Services (USCIS) has sole jurisdiction over such relief." However, it then incorrectly concluded that judges could not sign certifications, because it misconstrued the act of signing a certification to be adjudication of the U visa case, which certification is not. The Court did not understand the difference between certification (the formal required mechanism for providing evidence to USCIS) and adjudication of the U visa application. Certification is not an adjudication of the applicant's eligibility for a U visa. This decision ignores the fact that the U visa statute and regulations explicitly list judges as U visa certifying officials, in a carefully circumscribed role, as certifiers, and not as immigration adjudicators.

The DHS Resource Guide on U and T visas confirms that a certification is not an adjudication, stating:
Federal, State and local... agencies do not grant or guarantee a U visa or any other immigration status by signing a U visa certification (Form I-919B). Only USCIS may grant or deny a U visa after a full review of the petition to determine whether all the eligibility requirements have been met and a thorough background investigation.

By signing a U visa certification, the judge only certifies:
- The judge's identity;
- The judge's position as a judge, magistrate, commissioner, alderman, judicial referee, surrogate, mayor, chancellor, or other governmental official authorized to sign U visa certifications;
- That the applicant is a victim of a "qualifying criminal activity";
- That the judge is either detecting, investigating, prosecuting, or sentencing;
- That the victim possesses knowledge concerning the criminal activity and has contributed to it;
- That the applicant is a victim of a "qualifying criminal activity";
- The applicant's past or present helpfulness or likely future helpfulness in the detection, investigation, prosecution, conviction, or sentencing of one or more qualifying criminal activities.

In signing a U visa certification, the certifying judge is not sponsoring, endorsing, or granting the victim a U visa. USCIS is the sole adjudicator of U visa petitions and a completed certification does not guarantee approval of the U visa by DHS officials. A signed certification does not confer on the victim legal immigration status. By signing a certification, a judge, or any other certifier, is not making any recommendation of the applicant's eligibility for a U visa. The certification is a mandatory piece of evidence that must be filed as part of the victim's U visa application. A certification, evidence that the petitioner is a victim of a qualifying criminal activity and that the victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of that activity.

To be granted a U visa immigrant victims are required to prove to USCIS that they meet all U visa eligibility requirements, which includes proof (e.g., of substantial harm, admissibility, and waiver eligibility) that goes beyond the information contained in the U visa certification. USCIS also requires that all applicants for immigration relief undergo a full criminal and immigration background check using fingerprints. USCIS will review a U visa application in its entirety, which includes the U visa application form, the certification, an affidavit from the victim, and any other supporting evidence such as police reports, medical records, pictures, court documents, and witness affidavits. During the adjudication process, USCIS may elect to contact the certifying agency to ask whether the victim has continued to provide assistance that was reasonably requested or for other additional information.

Neither conviction nor prosecution is required.

In addition, as with every petitioner seeking immigration relief, an applicant for a U Visa must be admissible to the United States. There are specific waivers of inadmissibility available to recipients of U visas if the Section 212(a)(3)(B) Security determines that such a waiver would be in the public or national interest. The U visa regulations provide extremely generous waivers of inadmissibility grounds for U visa petitioners; in general, most grounds of inadmissibility may be waived for a petitioner granted a U visa except for those who were participants in Nazi persecutions, or who committed acts of genocide, extrajudicial killings, or torture.

"Helpfulness" in the U Visa Context

Some courts have failed to fully consider the U visa regulations and DHS resources related to helpfulness. For example, in Torres-Lopez v. Scott, the court denied a certification because "plaintiffs cannot be helpful to an investigation that does not occur and there is no indication that criminal investigation (or alone prosecution) of Defendants is likely." Aguirre-Falacios v. Deie also erroneously determined that there could be no certification by the presiding judge because it was dismissed, and therefore the U visa certification request of the court was moot. Further, in Nunez, the court declined to issue a certification because the defendant pleaded guilty, resulting in no trial, and the court found there was no basis to find whether the victim was actually helpful. The courts' conclusions in each of these cases fail to understand the U visa context, contradicts the published regulations, policies, and positions of DHS, and ignores the framework that federal immigration officials have established and implemented.

Government agencies with certain authority are authorized to certify.

The fact that a case did not go to trial does not negate the past helpfulness the victim provided, and a certification can still be completed even if the case did not go forward. This past helpfulness often includes but is not limited to calling the police for help, making a police report, and meeting with investigators and prosecutors. The certifying agency or official may still certify regardless of the outcome of the case. This includes, and is not limited to, instances in which the prosecutor decides not to prosecute, there is no indictment, or the case is dismissed. Romero-Hernandez wrongly ruled that because the case was dropped, the victim would not be able to show helpfulness because there was no pending investigation or prosecution. Such holdings seemingly ignore the past helpfulness that was provided by a victim in reporting the criminal activity and assisting in the detection, investigation, and prosecution of the case up to the point at which the prosecution made the decision to drop the charges.

Judicial officials will sign U visa certifications based on probable cause or the court's issuance of findings or court orders in a civil, criminal, or administrative law cases in which the court believes that the immigrant seeking U visa certification:
- Has been the victim of one or more U visa listed criminal activities;
- Possesses knowledge about the criminal activity; and
- Is being, has been, or is likely to be helpful in one or more of the following: detection, investigation, prosecution, conviction, or sentencing of the criminal activity the victim suffered.

Courts have been advised by DHS that:

The certification signed by the judge or other certifying official demonstrates that the applicant "has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity." Judges need only assess the helpfulness using the same standard as the judge in making probable cause determinations. DHS advises that certification be granted on "any credible evidence," which is parallel to probable cause.

In the vast majority of cases when judges are asked to sign certifications, the victim will be able to demonstrate past or current helpfulness through the victim's involvement in the events that led up to the case coming to court to be heard before the judge. In criminal cases this may have involved calling the police for help, filing a police report, appearing at hearings on the criminal case, and testifying. In a civil case, including but not limited to civil protection orders, custody, or employment actions, helpfulness may involved seeking a protection order, participating or filing cases against an abusive employer, or raising domestic violence or child abuse in a custody or divorce case. The vast majority of cases in which U visa applicants will seek judicial certification will be cases in which the victim has already demonstrated past or present helpfulness.

In some cases in which the victim's prior helpfulness may be unclear, including when the victim has previously been afraid to contact the police, the U visa statute authorizes certifiers to sign certifications based on the likelihood of future helpfulness. Therefore, certifiers, including judges, may certify when the judge believes, based on the facts of the case, that there is a likelihood of future helpfulness for the purposes of certification. The judge can determine, based on the facts of the case and the nature of the qualifying criminal activity perpetrated against the applicant, that there is probable cause to believe the victim would be helpful to provide future helpfulness to law enforcement, prosecutors, or other government agencies investigating the criminal activity the victim would cooperate in such future investigation, prosecution, sentencing, or conviction. However, in exceptional cases in any case in which the police have made some form of investigation there will likely be ample evidence from the court records, court appearances, and other information the court receives and observes as part of the court's investigation.
process of past or present helpfulness of the victim. If there is evidence of past or present helpfulness, that is sufficient for certification and the certifying agencies, including courts, do not need to engage in predicting future helpfulness to certify.

**Evidence of Helpfulness**

A judge may observe evidence of helpfulness in cases that have not, do not, or may not reach the stages of full prosecutions, conviction, or sentencing. Examples of evidence of helpfulness that a judge may consider in a case that does not involve a full prosecution, conviction, or sentencing include the following:

- The victim witness gives strong and helpful information to law enforcement that is documented in a police report, but the charging deputy declines to file charges.
- The victim was cooperative with law enforcement.
- The victim was cooperative or gave evidence at one or more of the following: the initial appearance, bond hearing, hearing on a criminal or civil protection order, preliminary hearing, or arraignment.
- The victim testified in court.
- The judge finds probable cause to sign an arrest warrant based on witness and victim interviews and a police investigation.
- The victim is cooperating with the prosecution, but the prosecution may delay the case because of lack of sufficient corroborating evidence, so the prosecutor declines to prosecute.
- The victim provides evidence to prosecutors or testifies, the case ends in a acquittal or with a hung jury, and the prosecutor decides not to refile the criminal case.
- The prosecutor initiates a criminal prosecution in which a victim is providing helpful evidence to police and prosecutors, but the
The purpose behind the U visa is to encourage the reporting of criminal activity, cooperation with law enforcement, and continued participation in the criminal justice.\(^a\) Fostering this participation was a particularly important goal of the U visa because the key beneficiaries of the U visa, undocumented or out-of-status immigrants, are often wary of law enforcement or may be afraid to report a crime, fearing the same crime for issue of arriving law enforcement to their immigration status.\(^a\)

DHS adjudicates helpfulness in the initial U visa application, evaluating the certification together with a totality of the supporting documentation submitted with the U visa application. Once a U visa is approved, the victim has a continuing obligation to cooperate with police, prosecutors, and other government agencies' reasonable requests for assistance.\(^a\)

USCIS will not provide U visas to petitioners who have unreasonably refused to continue cooperating with reasonable requests from law enforcement. In determining whether the victim unreasonably refused to provide assistance, USCIS is required to consider the totality of the circumstances based on all available affirmative evidence in the case including, fear, fraud, or coercion, the nature of the victimization, timelines for victim and witness assistance, and the specific circumstances of the applicant, including fear, severe traumatization (both mental and physical), and the age and maturity of the applicant.\(^a\)

**Certification and Judicial Ethics**

The Minnesota Board of Judicial Standards released Opinion 2015-2 on June 26, 2015, addressing the permissibility of U visa certification by judges.\(^a\) One of the issues the advisory opinion specifically addressed is the concern that judges are ethically prohibited from making any public statements about an investigation or inquiring into what might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.\(^a\) However, the advisory opinion makes the distinction that a judge may make such statements in the course of official duties and further recognized certification for U visas as falling into the category of a judge's "official duties."\(^a\)

The Board also considered whether, by signing a certification, judges are improperly involving themselves in the role of the prosecution for forecasting whether a witness may be helpful to the prosecution.

The Minnesota Board on Judicial Standards advisory opinion discussed how and under what circumstances judges can sign U visa certifications without violating the canons of judicial ethics and included well researched legal analysis of U visa law. The Board determined that U visas must be consistent with the U visa statute, regulations, and DHS publications on the U visa. The opinion, however, was legally inaccurate in stating in dicta that, after the certifying agency has made its certification, "the United States Citizenship and Immigration Services ("USCIS") will then review the application de novo."\(^a\) This statement is erroneous. The signing of a U visa certification is not an adjudication of an immigration case.\(^a\) USCIS is the only body that reviews and adjudicates U visa applications.\(^a\)

In fact, the regulations require USCIS to conduct a review of all evidence submitted in connection with the U visa application and may investigate any aspect of the petition.\(^a\) USCIS adjudication is not a de novo review of any prior adjudication by the state court.

Although the Minnesota Advisory Opinion is more conforming to the congressional and statutory intent of the U visa certification procedures than the North Carolina Advisory Opinion, there are still some issues with the guidance. The opinion erroneously implies that a judge should only certify during sentencing and conviction, or when the case is otherwise completed.\(^a\) However, the opinion reaches this conclusion based on a misinterpretation of the USCIS regulations. The Advisory Opinion concludes: Certification by a presiding judge in a pending criminal case. The applicable federal regulations indicate that the appropriate time for judges to determine helpfulness to following conviction during the investigation or prosecution of a criminal matter.

However the full quote from the regulatory history accompanying the U visa regulations states as follows: The rule provides that the term "investigation or prosecution," used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity, as well as the prosecution, conviction, or sentencing of the perpetrator of such crime or criminal activity. 8 CFR 214.14(f)(3).

Referring to the AG Guidelines, USCIS is defining the term to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer's investigative duties. AG Guidelines, at 22-23. Also referring to the AG Guidelines, USCIS is currently using the term to include the conviction and sentencing of the perpetrator because these extend from the prosecution. Id. at 26-27. Moreover, such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C. 1184(a)(3), which permits judges to sign certifications on behalf of U nonimmigrant status applications. INA sec. 214(p)(1), 8 U.S.C. 1184(a)(3). Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term "investigation or prosecution" should be interpreted broadly as in the AG Guidelines.

Neither conviction nor prosecution is required for a certification, including a judge, to sign a certification.\(^a\) In the U visa regulations USCIS stated that "USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the early stages of an investigation."\(^a\) In the context of U visa certification by judicial officers limiting certification to following conviction is an incorrect interpretation of federal U visa laws and regulations. In addition to signing U visa certifications following conviction or sentencing, which is clearly authorized, judges are authorized to sign U visa certifications based on detection of criminal activity that comes to the court's attention most often because of the victim's helpfulness. The court's ability to detect criminal activities includes, but is not limited to, criminal court cases. Courts detect criminal activities in civil and family court cases, including but not limited to cases in which: Victims of domestic violence, child abuse, stalking, or sexual assault came to court seeking civil protection orders.\(^a\)

A parent provides evidence of domestic violence or child abuse in a custody case.\(^a\)

A non-abusive protective parent provides evidence to assist in a child abuse case.\(^a\)
The EEOC, the US Department of Labor or a state labor enforcement agency brings a case in which the facts of the case include information about criminal activities occurring in the workplace, for example, sexual assault, extortion or felonious assault.

Relevant U visa evidence and testimony can be found in a family or civil court case regarding to the victim’s communication with law enforcement officials or prosecutors (e.g., 9-1-1 tapes, police reports, interviews with investigators, meetings with prosecutors, or the victim reported crime victim’s compensation).

In criminal cases evidence of a victim’s helpfulness at earlier stages of the criminal case prior to the victim’s decision to cooperate are generally accepted as a basis for judges determining helpfulness include but are not limited to information in the court record, including pretrial motions, regarding the victim.

- Calling the police for help;
- Making a police report;
- Speaking with investigators;
- Appearing in court at arraignments;
- Serving on a grand jury;
- Attending motions hearings;
- Receiving a criminal no-contact, stay-away or protection order;
- Reporting incidents of witness tampering or obstruction of justice to prosecutors that became part of prosecutor’s motions to the court; or
- Appearing at court on dates set for the criminal case.

When the court observes the victim’s involvement in a civil, family, or criminal case that is based upon criminal activity (e.g., a criminal prosecution, an EEOC employment case, a civil protection order, or a child abuse case) or in which the victim reveals to the court in testimony, majesty or otherwise other evidence information about criminal activity they suffered (e.g., evidence of domestic violence in a custody or divorce case) the court can base its certification on deposition of criminal activity and can sign U visa certifications without regard to whether the case involves or proceeds through criminal conviction or sentencing. The DHS confirms in its Resource Guide on U visa certifications that there is no statutory or regulatory requirement that an arrest, prosecution, or conviction be necessary for someone to be eligible to apply for a U visa.

The Minnesota Board of Judicial Standards confirmed the following about the Judicial Ethics Code:

- With regard to a case in which the prosecution has been completed, the fact that the case is closed or completed "does not prohibit the presiding judge from signing an I-919 form certifying that a U visa petitioner was helpful."187
- Whether a judge should sign a certification in an ongoing civil or criminal case is a matter of law and does not involve a judicial ethics code.189
- For a judge to sign a certification the judge must have an adequate basis for the averments made in the certification.190
- In finding that signing U visa certifications does not abuse the prestige of a judicial office the board found: "Federal courts have recognized certifications by judges as authorized. Abuse is not involved when the law and the courts countenance judicial certifications."191

Recommended best practices for judicial certification that promote certification by judges in U visa cases and are consistently consistent with judicial ethics include:

- Completed cases: Once the criminal or civil case is completed judicial officers can sign certifications based on the courts orders and findings issued, upon the court’s observation of helpfulness, or upon the court record in the case. The case may be completed in a wide number of ways, including but not limited to following a trial in which the court issued an order, based on a court order issued by consent of the parties when the court considered, when the prosecution dropped the case or asked that the court dismiss the case, or when the perpetrator was found guilty. In closed cases signing a certification by a judge is an administrative function that is one of a judge’s ‘official duties.’ Because there is no open case before the court and judicial certification is based on the court records, evidence in the case before the court, hearings held on the record before the court, and also potentially the judicial officer’s observations regarding the victim’s helpfulness during the civil or criminal case, certifications can be requested and issued without providing notice to parties in the case.

- Open and pending civil and criminal cases: When a party seeks certification in an open criminal or civil case, for the court to ethically consider the certification request the court should provide parties in the case with notice and opportunity to be heard on the certification request. By disclosing the request to the parties and hearing arguments regarding the certification, the court handles these requests to certify in a manner similar to other motions that come before it. In this way the court can rule on the certification request while maintaining the court’s independence, integrity, and impartiality. Signing U visa certifications in an open case is similar to making probable cause determinations in the early stages of a pending criminal case.

Judicial Officers Can Certify

Most existing case law has correctly held that judges are qualified to make U visa certifications. However, there are courts that have correctly interpreted the U visa regulations issued by USCIS as not allowing judges to certify. In Ayan v. Hospitality and Catering Servs., Inc., the court denied a request for certification questioning DHS regulations and prior interpretations and concluding that a judge cannot certify when the judge had no responsibility in any U visa prosecution of the qualifying crime. The court disagreed with prior interpretations in other cases and concluded that a broad read of the regulations to allow certification after a trial in which the judge had no connection to the prosecution or investigation involving victims would do violence to the rest of the regulatory language. The court declined to suggest the circumstances under which it would be appropriate for a judge to sign a certification. In other court cases, while still holding that judges may certify under the statute, courts have imposed limitations on the interpretation of under what circumstances a judge may certify that do not exist in and do not comport with the intended scope of the statute and DHS regulations. Further, some courts have gone so far as to question the permisibility of judicial certification or even rule it as impermissible.

In each of these cases the courts failed to consider the Chevron requirements that DHS’s interpretations in the U visa regulations, based on notice-and-comment rulemaking, afford. In fact, in no mention was made in any of these cases of the Supreme Court cases governing when courts are required to defer to a federal agency’s interpretation of a federal statute.

Although, the Minnesota Board of Judicial Standards’ Advisory Opinion is in large part consistent with U visa regulations and statutes, it contains some analysis that misinterprets U visa regulations regarding judicial certification. The opinion relies on case law from cases that failed to follow Chevron requirements and reached conclusions that are legally incorrect and in conflict with the statute, regulations, and DHS policies on U visa certification. As a result the Minnesota opinion recommends that judges only certify after conviction or sentencing. Such limitations set out in the opinion are contrary to the intended scope of the U visa regulations.

There have been notable cases that have correctly ruled that judicial certification is permissible when the petitioner meets the certification requirements. In Garofolo v. Audubon Castles, Agmt, LLC, the court unequivocally stated that the qualification of federal judges to certify is indisputable. Further, in Villagers v. Metro. Gov’t of Nashville, the court accepted the petitioner’s argument showing that they were victims of a qualifying criminal activity and further recognized that judges are qualified to certify.
DHS regulations contemplate that there are circumstances under which an investigation or prosecution that makes the victim eligible for a U visa may never reach the prosecution stage or may not result in a successful conviction. Even in such instances, U visa certification is granted if it is appropriate if the individual seeking the U visa was a victim of a qualifying crime and if the individual was, is being, or is likely to be helpful in the investigation or prosecution. Federal DHS policy is that a certification may occur at any stage of the case, from the point of detection, through the investigation, to the initiation of prosecution, pre-trial, whether the victim is testifying, and at the conclusion of the case.

Government agencies that have criminal, civil, or administrative investigative or prosecutorial authority and who are authorized to sign U visa certifications. Personalized authorized by the U visa statute or the U visa regulations to sign certifications include federal, state, local, tribal, and territorial law enforcement agency, including a state police department, a sheriff, the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco, Firearms and Explosives federal, military, or state prosecutors, elected attorneys, and attorneys general; the Department of Homeland Security; judges; including any government official with delegated authority from a federal, state, local, tribal, or territorial court to decide cases, including but not limited to administrative law judges, commissioners, magistrates, arbitrators, judicial referees, surrogates, masters, and chancellors. Other authorized certifiers include child or adult protective services, the Equal Employment Opportunity Commission, and the Department of Labor. Judges, commissioners, magistrates, and other officials with delegated authority from a federal, state, local, tribal, or territorial court are specifically authorized by statute to sign U visa certifications. Certification by courts is based on the victim’s role in the detection, conviction, or sentencing of the criminal activity. When a crime victim reveals facts to the police that lead to a criminal conviction, that victim is considered to be a victim of a crime, even if the victim is not witness to the crime.

A certify, an agency or officer must be able to hold liable for the future actions of a victim for whom the agency have a lien on a U visa. The U visa certification simply states that the person was a victim of a qualifying crime, that the information relating to the crime, and was helpful in the investigation or prosecution of that crime. The certification does not guarantee the future conduct of the victim or grant a U visa.

The North Carolina Judicial Standards Commission’s Advisory Opinion, however, misinterprets the nature of certification, characterizing it as voluntary character testimony. This opinion ignores the fact that judges routinely make credibility determinations and issue findings of fact in the course of their judicial duties. In carrying out these core judicial roles judges are clearly acting to fulfill their legal obligations and the decision-making is not characterized as character testimony as to any individual or party. Signing a U visa certification provides evidence to USCIS. It is the role of USCIS to determine the quality of the totality of the evidence of helpfulness and whether the quantity of evidence that the victim has presented is sufficient to meet the victim’s burden of proof for the U visa petition. In signing the certification the court is not adjudicating the U visa case, which is the role solely reserved for USCIS. As a result, the U visa certification is not a personal recommendation, rather it is simply a certifying statement providing evidence that: (1) a qualifying criminal activity has occurred; (2) the victim has information about the criminal activity; and (3) an act (or acts) of helpfulness has occurred or the immigrant victim is likely to be helpful in the future.

A certifying agency should not make character considerations when making the decision to sign a U visa certification. USCIS makes any character determinations necessary to the adjudication of the U visa petition. A victim with a criminal history is not automatically precluded from approval for a U visa. USCIS denies responsibility for considering a victim’s criminal history on a case-by-case basis as part of the U visa adjudication and may take into account whether the criminal behavior was related to the victimization. DHS encourages certifiers to include in the certification or as an attachment to the certification any information about the victim’s prior criminal history that the certifying officer wants to bring to the attention of USCIS officials adjudicating the U visa application. As part of its adjudication USCIS will conduct a thorough background and security check and will review all available information concerning arrests, immigration violations, and security issues. It is not the role of the certifier to conduct background checks or to withhold certification based on any uncertainty regarding an applicant’s background or character. USCIS may or may not deny a U visa application based on the victim’s criminal history, and will review all available information regarding the victim’s background.

Certification in Civil Cases

There are a number of court cases, which have incorrectly held that certification cannot be made in a civil case or when a criminal case has not been opened. This is another example of court rulings that do not comport with DHS’s implementation of the U visa statute.

Federal and state court judges can sign certifications based on the victim’s involvement in a civil or criminal court case. Administrative law judges can sign certifications based on the involvement of an immigration crime victim who reveals criminal activity perpetrated against the victim as part of an administrative law matter. Judges may certify at any time after detecting a qualifying U visa offense. Judges most commonly issue certifications as administrative matters in a civil or criminal court case that has been concluded. However judges can upon motion, service, and consideration of any opposition to consider certifications in an ongoing civil or criminal case. In a criminal case, with notice to the prosecution and the defense, judges can issue certification after they have observed the victim’s helpfulness in the criminal case, which may be after arraignment, during a probable cause hearing (grand jury or preliminary hearing), or while the criminal case is still pending. The most common scenario is for judicial certifications to be requested once the criminal case has been completed or following the judge’s issuance of a stay in a civil or criminal court case.

There are also a wide range of civil court actions that could involve criminal activities, for example:

- Domestic violence, sexual assault or stalking protection order cases
- Custody cases in which criminal activity has been perpetuated against a parent or child
- A family or juvenile court case involving child abuse or neglect
- A family court case involving elder abuse or abuse of a dependent adult
- A civil court case involving a victim of dating violence or stalking
- An employment discrimination or labor law violation case in which the harms workers suffered included being subjected to U visa listed criminal activities

A judge may observe evidence of helpfulness in civil court cases for the purposes of U visa certification, regardless of whether a criminal case is ever opened against the perpetrator of the underlying criminal activity or not. For example, a victim of sexual assault, human trafficking, or extortion in the workplace offers helpfulness when he cooperate with the EEOC or Department of Labor in the investigation of the employer. That case may or may not also include evidence that the victim made certifications in an ongoing civil or criminal case. The police report is evidence of another form of helpfulness.
Civil protection orders were designed as an alternative to criminal proceedings in cases of domestic violence. Many of the U visa qualifying criminal activities would also serve as a statutory basis under state law for issuance of a protection order. Oftentimes, obtaining a protection order from a court constitutes sufficient helpfulness for U visa certification. In addition, when a victim of domestic violence, dating violence, or stalking seeks a civil protection order, the victim is seeking local law enforcement officers involved in serving protection orders in detection of the criminal activity. The act of obtaining a protection order provides helpfulness to police and prosecutors because the perpetrator can be criminally prosecuted for future abuse occurring after the protection order is issued.

In Matter of Rosales, the court correctly determined in a protection order proceeding that it had the authority to sign a U visa certification. The court demonstrates how a court in a protection order case, is able to glean the criminal acts for which the individual sought the protection order from the original family offense petition. DHS has confirmed that certification may also be appropriate in custody cases in which domestic violence, rape, incest, or any of the qualifying criminal activities listed in the U visa statute are presented as evidence in the family court custody case.

Certification by a Non-Presiding Judge

Another misconception about judicial certification is that a judge may only certify if the judge presided over the victim's case. U visa certification can be provided by any judicial officer with delegated authority from a federal, state, local, tribal, or territorial court. The judge in Matter of Rosales, issuing the U visa certification was not the judge who presided over the victim's protection order case. The judge who issued the protection order had retired. The certifying judge reviewed the hearing transcripts, the court's file, and the family offense petition to determine whether the applicant was eligible for certification. Despite the fact that neither the transcript nor the judge's file indicated the criminal activity that resulted in the issuance of the final protective order, the certifying judge was able to refer to the record to complete the certification.

Matter of Rosales provides an excellent example of how a court that did not hear the original case can obtain adequate basis for the avenues made in the certification. Judges may sign a certification whether a case has been adjudicated before the specific judge signing the certification or not. Under U visa certification regulations, any state, local, or federal judge with knowledge about the criminal activity the victim suffered and the helpfulness of the victim potentially has an adequate factual basis to sign. USCIS accepts certifications signed by judges who were not assigned to the case when the judge signing the certification has knowledge of the case from reviewing the record or consulting with the judge who heard the case.

There is no statute of limitations regarding how long after the court has been involved in a case that a U visa certification can be requested and signed. As a result, it is not uncommon for victims to seek certification from a court at a time when the judicial officer or officers who heard or decided the victim's civil or criminal case is no longer available to certify. Common examples of circumstances in which a judge other than the presiding judge would be needed to sign a certification include the following situations:

- When the presiding judge assigns to a new calendar, switches dockets, or is one of the judges assigned to ride a circuit in a rural jurisdiction;
- When the judge who presided over the case has retired, died, is incapacitated, was not re-elected, is on extended vacation, sick leave or otherwise unable to sign or other administrative key decisions and is away from the jurisdiction or left the country;
- When the court assigned all of the U visa certifications to a particular judge who signs certifications for that jurisdiction.

Many court records will contain sufficient information about the criminal activity, the identity of the victim, and the victim's helpfulness for a judicial officer to sign a certification in a case that was not originally before the judicial officer being asked to sign the certification. The needed information could come from court records, judicial findings, recordings of court hearings, pleadings, settlement agreements, and family offense petitions to complete the certification.

Matter of Rosales provides an excellent example of how a court that did not hear the original case can obtain adequate basis for the avenues made in the certification. Judges may sign a certification whether a case has been adjudicated before the specific judge signing the certification or not. Under U visa certification regulations, any state, local, or federal judge with knowledge about the criminal activity the victim suffered and the helpfulness of the victim potentially has an adequate factual basis to sign. USCIS accepts certifications signed by judges who were not assigned to the case when the judge signing the certification has knowledge of the case from reviewing the record or consulting with the judge who heard the case.

This article has examined the difficulties courts have had as they struggle with U visa certification in cases that address issues of first impression. When federal immigration laws and state and federal laws governing courts, law enforcement, prosecution, labor rights, domestic violence, sexual assault, and human trafficking intersect create ambiguity, such ambiguities can only be addressed by implementing regulations and policies issued by DHS.

In the emerging case law regarding U visas, many issues are raised and few are settled as jurisdictions struggle with issues of first impression. Outcomes across jurisdictions have differed and certainly jurisdictions will continue to diverge on many issues. Although an article of this scope, at this time, cannot resolve many of issues that arise in the different jurisdictions that have addressed U visas, a systematic review of the available decisions regarding U visas is useful and important to highlight the most important key factors and decisions and covenants for litigants and parties in these cases. The U visa is a powerful tool granted by Congress to the criminal justice system. When used correctly, it aids the system in bringing perpetrators to justice and protects crime victims and witnesses.

NOTES

1. Although commonly referred to as the U visa, a visa is a document that permits the holder to request permission to enter the United States at a port of entry. However, what is referred to as a "U visa" is actually a form of immigration status most often granted to people already within the borders of the United States pursuant to 8 U.S.C. §1101(a)(15)(U) of the Homeland Security (DHS) regulations refer to the "U visa" as "U nonimmigrant status." See generally, "New Classification for Victims of Criminal Activity: Eligibility for the "U" Nonimmigrant Status: Interim Rule," 72 Fed. Reg. 33003 (Sept. 17, 2007). This article adopts the colloquial use and refers to this status with the common term "U visa."


7. Qualifying criminal activities covered by the U visa statute INA §101(a)(15)(U) are: domestic, sexual contact, blackmail, domestic violence, extortion, false imprisonment, force, assault, personal violence, abuse, sexual assault, sexual exploitation, sex trafficking, torture, terrorism, witness tampering, unlawful criminal restraint, and related criminal activities or attempts, conspiracy, or solicitation to commit any of the previously mentioned crimes. Dept. of Homeland Sec. (DHS), Resource Guide, supra n. 6, at 7.

8. See generally, Minnesota Board of Judicial Standards, U Visa Certification by Judges: Minnesota Board of Judicial Standards


13. VAWA 2000 § 1513(e) (emphases added).


15. Id.


17. CSA, Complaint Letter, supra n.3 (the U Visa is not available to individuals who have filed VAWA self-petitions and U Visas).


19. Kristina E. Szeszo, David Staudtfer, Beritsh Awerri, & Lesley E. Orloff, "Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants," 28-31 (Feb. 12, 2014) available at http://statelibrary nc.us/ed/127-vaaw-final_report-on-early-access-to-vaaw-02-12/ last accessed Oct. 28, 2017 (Describing how immigrant victims use their criminal and civil justice systems increased after the victim has filed a U visa application or VAWA self-petition and after the victim received legal work authorization as a part of the immigration application process) See also, Lesley Orloff, Leslie Weinberg, & Bondit Awerri, “U-Visa Victims and Lawful Permanent Residency,” Nat’l Immig. Women’s Advoc. Project (Sept. 6, 2012), available at http://statelibrary nc.us/ed/127-confidentiality-stabilize-log-theslimer.pdf; last accessed Oct. 28, 2017 (70 percent of U visa victims, after receiving certification continue to provide ongoing helpfulness in the criminal investigations and prosecutions. Another 29.45 percent of U visa cases willing to continue cooperating because they have been involved in cases in which law enforcement and prosecution officials have not requested additional helpfulness from the victim.) Ongoing cooperation may not be requested for a number of reasons. Generally the reasons may include the following: There may be an unwritten warrant for the perpetrator’s arrest, the perpetrator may not have been identified, prosecutors may have decided that they do not have sufficient evidence to prosecute, and law enforcement officials are no longer pursuing the criminal investigation.


20. Id.


24. Removal is the term used in immigration law statutes for deportation.


31. DHS, Resource Guide, supra n.6, at 3.

32. Id.

33. Id.

34. Congress included detection among the activities they wanted to encourage in the U visa legislation. VAWA 2000 § 1513(a)(2)(A) ("The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(13)(B)(ii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States."). See also, DHS, Resource Guide, supra n.6, at 4.

35. DHS, Resource Guide, supra n.6, at 19, 21.


37. See 8 C.F.R. § 214.14(a)(4) ("Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.").


40. Formal Advisory Opinion, supra n.36.

41. DHS, Resource Guide, supra n.6, at 4.

42. See Immigration and Nationality Act (INA) § 265(e); 8 U.S.C. § 1255(m); 8 C.F.R. 245.25 (To apply for lawful permanent residence U visa holders must be physically present in the United States for three years in U visa status; must demonstrate that their continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and that they provided cooperation to government officials regarding the criminal activity or did not unreasonably refuse to comply with reasonable requests for assistance. The criminal history of any U visa applicant applying for lawful permanent residency will be reviewed and USCIS will also review mitigating factors in deciding whether to exercise its discretion to grant lawful permanent residency to a U visa holder with a criminal history.)


44. INA § 1011(b)(15)(U); 8 U.S.C. § 1101(a)(15)(U).


67. See 8 C.F.R. § 214.14(e)(5) (2013). (Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.”)

68. U.S.C. § 214.14(e)(5). (Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.”)

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100. U.S.C. § 214.14(e)(5). (Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.”)

101. U.S.C. § 214.14(e)(5). (Investigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity.”)
109. Immigration law requires every individual seeking to enter or remain lawfully in the United States to be admissible. That means that the person could be prevented from obtaining legal status if the person is found to be inadmissible. 8 U.S.C. § 1182(a). (Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States.)

110. See INA, § 212(d)(3); § 212(d)(14) & 8 U.S.C. § 1182(d) (5)-(6) & 1182(d)(14).

111. See INA, § 212(d)(2); § 212(d)(14) & 8 U.S.C. § 1182(d) (5)-(6) & 1182(d)(14). See also 72 Fed. Reg. 35013, supra n.1 at 35018. (In addition, qualifying criminal activity may occur during the commission of non-qualifying criminal activity. For varying reasons, the perpetrator may not be charged or prosecuted for the qualifying criminal activity, but instead, for the non-qualifying criminal activity. For this reason, the course of investigating Federal embezzlement and fraud charges, the investigators discover that the perpetrator is also abusing his wife and children, but because there are no applicable Federal domestic violence laws, he is charged only with nonqualifying Federal embezzlement and fraud crimes.)

112. 72 Fed. Reg. 53013, supra n.1, at 53019, 53020. (In the case of a victim who is an under-16 year old child, or a person who the perpetrator, if found guilty, the victim's family may be provided a parent, guardian, or next friend of the immigrant U visa applicant victim.)


114. Id., at 6.


116. Id., at 6.

117. Id., at 6.


120. It is important to note that the fact that this case at this time was dropped does not mean that the evidence that the victim provided to police and prosecutors in the case ceased to provide helpful information to law enforcement officials who can often use that information in future criminal investigations or prosecutions involving the same criminal perpetrator or enterprise. The vast majority of U visa cases involve criminal activities that have high division cases (e.g., domestic violence, sexual assault, human trafficking, or stalking).


123. DHS, Resource Guide, supra n.6, at 6.

124. DHS, Resource Guide, supra n.6, at 4 (see note 5, "If under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the criminal activity on the individual's behalf.").

125. DHS, Resource Guide, supra n.6, at 6.


127. 72 Fed. Reg. 53013, supra n.1, at 53019.

128. Id., at 53020 & C.F.R. § 214.16(a)(5).

129. DHS, Resource Guide, supra n.6, at 6.

130. See generally, VAWA 2000 § 151A(a).


133. It is clear that this legislative history and purpose of the U visa included by the U visas congressional drafter was not considered by the court in Nuñez-Romero, supra n.113, in which the court narrowly interpreted "helpfulness" as meaning "helpfulness to the Government" and interpreted the government that could be helped as limited to the government with which the victim or spouse is affiliated. The court stated that "given that federal judges must remain neutral and impartial in presiding over criminal cases, it is difficult to envision how an alien could ever be 'helpful' to a Federal...judges.")

134. 72 Fed. Reg. 53013, supra n.1, at 53020 .

135. Id., at 5.


137. Id., at 6.

138. Id., at 5. It is important to note that such future helpfulness is not limited to helpfulness in criminal cases. The regulations also recognize that certifying agencies include the EEOC as an agency that detects and investigates sexual assault and other U visa criminal activities in the context of EEOC employment discrimination investigations and enforcement actions brought in federal courts. In EEOC cases, employee victims of sexual assault are eligible for certification based on their helpfulness to the EEOC without regard to whether the victim encountered the sexual or sexual assault or sexual harassment in the workplace to law enforcement officials in addition to reporting the details of the sexual assault to the EEOC.

139. DHS, Resource Guide, supra n.6, at 10 ("Helpfulness means the victim was, is or likely to be assisting law enforcement in the investigation or prosecution of the criminal activity of which he or she is a victim.").

140. See 72 Fed. Reg. 53013, supra n.1, at 53020 (broadly defining "investigation" and "prosecution" to include the conviction and sentencing of the perpetrator); see also 8 U.S.C. § 1184(c)(1).

141. Bajaj v. U.S. Dept. of Labor, 2016 U.S. App. LEXIS 14905, at 50, 50 (Sept. 13, 2016) (broadly defining "investigation" and "prosecution" to include the conviction and sentencing of the perpetrator); see also 8 U.S.C. § 1184(c)(1). It is important to note that while holding a broad interpretation
of helplessness to mean helplessness in the early or later stages of an investigation or prosecution, the State court, following Agans v. Hospitality and Catering Servs., Inc. 2013 WI 126, 284 N.W.2d at *4 (O.D. La. 2013), incorrectly ruled, limiting the circumstances in which a judge may certify.

142. Pendleton, supra n.8; See generally, Aruev, et al., supra n.112.

143. DHS, Resource Guide, supra n.6, at 21.

144. DHS, Resource Guide, supra n.6, at 4.

145. Form C Advisory Opinion, supra n.36.

146. INA, § 214(g)(2), 8 U.S.C. § 1184a(g)(2) ("This certification shall state that the alien has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of criminal activity described in section 101(a)(3)(T)(A)(ii) of this title."); DHS, Resource Guide, supra n.6, at 7. ("Helpful" means that the victim has been, is being, or is likely to assist law enforcement, prosecutors, judges, or other government officials in the detection, investigation, prosecution, conviction, or sentencing of the qualifying criminal activity).

147. DHS confirms that there are broad ranges of cases in which a judge or other government official has evidence of or observes the victim's helplessness in a past or ongoing investigation or prosecution in which the case did not result in a conviction or imposition of a criminal sentence. "Law enforcement, prosecutors, judges or government officials can certify a U visa based on past present, or the likelihood of future helplessness of a victim. A current investigation, the filing of charges, a prosecution or conviction is not required to sign the law enforcement certification. An instance may occur where the victim has reported criminal activity, but an arrest, prosecution, or conviction cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, where the perpetrator has fled or is otherwise no longer in the jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials. There is no statute of limitation on signing the certification—one can be signed for a crime that happened many years ago or recently. A certification may also be submitted for a victim in a closed case." DHS, Resource Guide, supra n.6, at 7.

148. Pendleton, supra n.121, at n.3.

149. Id.

150. Id.

151. DHS, Resource Guide, supra n.6, at 19.

152. Id.


154. DHS, Resource Guide, supra n.6, at 3.

155. The U visa adjudication system requires the victim to submit evidence, and USCIS is responsible for finding that the victim either provided or offered ongoing cooperation or that the victim did not unreasonably refuse to cooperate with reasonable requests for assistance in part of the USCIS adjudication of the victim's application to attain lawful permanent residency through the U visa program. See generally 73 Fed. Reg. 75540, supra n.80.

156. 73 Fed. Reg. 75540, supra n.80, at 75947.


158. Proposed Advisory Opinion 2015-2, supra n.70, at 5.

159. Id. (quoting Rule 2.10A and (D) of MN Code of Judicial Conduct).

160. Advisory Opinion 2015-2, supra n.157, at 2. The Congressional Research Service (CRS) in a report on VAWA self-petitioning and U visa programs discusses the only context in which a USCIS adjudication of a U visa could be properly considered de novo. Some victims applying for a U visa will have filed previously for other forms of immigration relief and later qualified for a U visa. For example, a work visa holder or a student visa holder who becomes a victim of rape is able to file for a U visa. In a domestic violence case the U visa victim's abusive husband or parent may have filed a family-based visa petition on the victim's behalf. CRS states in its report "Foreign national victims apply for a U visa using a Form I-918, Petition for Alien Fiancé(e) visa, along with supporting documentation to USCIS's Vermont Service Center (VSC). USCIS conducts a de novo review of all evidence submitted. This is as if the VSC were considering the question for the first time. Hence, USCIS may evaluate evidence previously submitted for other immigration benefits but is not bound by its previous decisions. Petitioners subject to final orders of removal may still be removed during adjudication of their U visa petition. 8 C.F.R. 214.14(c)." Kardel, supra n.72, at 32.


162. DHS, Resource Guide, supra n.6, at 3 ("USCIS is the federal component of the Department of Homeland Security (DHS) responsible for adjudicating (approving or denying) U and T visa applications." (emphasis added)).

163. See 8 C.F.R. § 214.14(c)(4) (emphasis added) (noting in addition that "USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including [certification].")


165. Id.

166. 72 Fed. Reg. 35013, supra n.1, at 35016. This quote discouraged the "AG Guidelines" upon which USCIS relies in developing the approach it took to the U visa regulations with regard to defining "investigation or prosecution" to include detection, conviction and sentencing. See, Attorney General Guidelines for Victim and Witness Assistance, at 9 (May 2005), available at https://www.justice.gov/archive/olplg_guidelines.pdf, last accessed Oct. 28, 2017.

167. DHS, Resource Guide, supra n.6, at 7 (stating a prosecution or conviction is not required to sign a certification).


169. DHS, Resource Guide, supra n.6, at 19.

170. Id.

171. Id.

172. Id.


175. Id.

176. Id., at 1, 7.

177. Id., at 4.

178. See generally, Pendleton, supra n.8.


180. Courts may see fewer U visa certification requests in pending cases because the U visa applications filed with


182. See Gara, supra n.136, at 4 ("It is undisputed that a judge is qualified to certify U visa applications"); see St. v. Rosales, 40 Misc. 3d 1216(A.N.Y. Pan. Ct. 2013) (reported table disposition); Agates, supra n.141, Villages v. Metro. Co. of Nashville, 907 F. Supp. 2d 907, 912 (M.D. Tenn. 2012)

183. See Agates.


185. Agates, supra n.182, at *4.

186. Id., at *5.

187. Id. (stating that judge must have provided over the criminal case); See Reijl, supra n.141, at 20 (stating that judicial certification requires a pending investigation or prosecution and that judge must have provided over the case); Nazare-Nahms, supra n.115, at 5 (stating that the
201. DHS, Resource Guide, supra n.6, at 16.

202. Id.


204. Id., at 6.

205. Id., at 6, 19.

206. Id., at 19.

207. Id., at 15 (Victims are U visa eligible if they offer helpfulness to government officials not limited to law enforcement, prosecutors, and judges. Examples include child and adult protective services workers, the ICE, and state departments of labor).

208. DHS, Resource Guide, supra n.6, at 6.

209. Id.


211. DHS, Resource Guide, supra n.6, at 10.

212. Formal Advisory Opinion, supra n.36.

213. ABA Model Code of Judicial Conduct, Canon 3, Rule 3.2, Comment [1] ("Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.").


216. DHS, Resource Guide, supra n.6, at 5 (stating that USCIS reviews the victim’s affidavit, police reports, court documents, and witness affidavits in their adjudication of the petition).

217. Id., at 6.

218. Id., at 26.

219. Id.

220. Id.

222. Id., at 26 (stating that a certificate with concerns over a victim’s criminal history should cite that information in the certification or attach a report detailing the victim’s criminal history).

223. Id.

224. Matter of Clara F., supra n.6 at 645; Matter of Patrick C., supra n.187, at 26; Romero-Hernandez, supra n.119, at 34; Agaton, supra n.141, at 76, 196; Agaton, supra n.6, at 59.

225. See generally DHS, Resource Guide, supra n.6, at 19, 20.

226. Id., at 6, 18-19.

227. Id., at 6, 16.

228. Id., at 19.

229. Id.

230. Id., at 22.

231. Id., at 22-23.

232. Id., at 23.

233. Id., at 15.


235. Id., at 849-859 (A wide range of criminal acts may form the basis for a civil protection order. State statutes specifically authorize protection orders based on almost any criminal act); id. at 844-845 (When a criminal act is committed by a person with whom the victim has a relationship covered by the state protection order statute, courts have jurisdiction to issue a protection order).

236. See generally DHS, Resource Guide, supra n.6, at 19, 22.

237. Matter of Rosales, supra n.182.

238. Id.

239. VAWA 2000, § 1513(1)(A)-(B); DHS, Resource Guide, supra n.6, at 7, 19.

240. Agaton, supra n.141, at 77-79 (the court emphasized the meaning of "responsible" within the context of the statutory language and used this to explain why judges who did not preside over the initial case could not certify).


242. Matter of Rosales, supra n.182 (holding that the information gleaned from these materials was a sufficient basis to complete the Form I-918 Supplement B).

243. Id.

244. 72 Fed. Reg. 53013, supra n.1, at 53023.

245. Pendleton, supra n.6 at 5.

246. DHS, Resource Guide, supra n.6, at 7, 19.
