

Tip Sheet for Courts Developing U Visa Certification, T Visa Declaration, and Continued Presence Protocols¹

By Gwentyth Szabo, Zachary B. Perez, Limayli Huguet, and Leslye E. Orloff
March 25, 2019 (Updated December 31, 2021)

This tip sheet has been developed to assist judges and courts developing U and T visa certification² and Continued Presence protocols and policies. The list below contains information that addresses common questions from judges and courts regarding U and T visa certification by judges and Continued Presence. It also connects readers with legally correct information from federal statutes, regulations, and the U.S. Department of Homeland Security (DHS).

- Statutory terms ‘investigating or prosecuting’ are defined to include any, and not required to include all, of the following:³
 - U and T visas: “Detection, investigation, prosecution, conviction, or sentencing.”⁴
 - U visa: Since judicial officials do not investigate or prosecute criminal activity, inclusion of detection, conviction or sentencing in the regulations’ definition of “investigation or prosecution” it is “necessary to give effect to ...8 U.S.C. 1184(p)(1), which permits judges to sign certifications.”⁵
 - Continued Presence: the person has been identified as a trafficking victim who might be a “potential witness” in a human trafficking investigation or prosecution.⁶
- ‘Crime’ is always ‘criminal activity.’⁷
 - U visa: “Investigation, the filing of charges, a prosecution or conviction is not required.”⁸ The perpetrator need not be charged with the criminal activity or could be charged with another crime which is not listed in the U visa statute.⁹

¹ For a sample model policy for courts on U and T visa certification *see e.g.*, San Francisco Superior Court Civil Division U Visa Certification Protocol, <http://niwaplibrary.wcl.american.edu/pubs/san-francisco-court-civil-division-u-visa-certification-protocol/> and Model U and T Visa Certification Protocol for State Courts (October 29, 2020) <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-certification-protocol-courts>.

² While the T visa technically requires a declaration, legally it is the same as a U visa certification. Thus, it will hereinafter be referred to as U and T visa certifications, even though the technical term for a T visa certification is a declaration.

³ 8 U.S.C. § 1101(a)(15)(U)(i); 8 C.F.R. 214.14(a)(5); 8 C.F.R. § 214.11(a) (2016); *see also* U.S. Dep’t of Homeland Security, U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutor, Judges, and Other Government Agencies at 6, 17 (2017) [hereinafter DHS T AND U VISA RESOURCE GUIDE], <http://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>.

⁴ DHS T AND U VISA RESOURCE GUIDE, at 18; *see also* U.S. Dep’t of Homeland Security, T Visa Law Enforcement Resource Guide: For Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies, at 2 (October 20, 2021), <https://niwaplibrary.wcl.american.edu/pubs/t-visa-resource-guide> [Hereinafter “T VISA RESOURCE GUIDE”]

⁵ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,020 (Sept. 17, 2007).

⁶ Center for Countering Human Trafficking, Immigration and Customs Enforcement, Continued Presence Resource Guide for Submitting Law Enforcement Agencies and Civil Attorneys 7 (July 2021) [Hereinafter “CONTINUED PRESENCE RESOURCE GUIDE,” <https://niwaplibrary.wcl.american.edu/pubs/continued-presence-resource-guide-2021>].

⁷ 8 U.S.C. § 1101(a)(15)(U)(i); DHS T and U Visa Resource Guide, *see also supra* note 1, at 6.

⁸ DHS T AND U VISA RESOURCE GUIDE, at 7.

⁹ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,018 (Sept. 17, 2007).

National Immigrant Women’s Advocacy Project (NIWAP, pronounced *new-app*)

American University, Washington College of Law

4300 Nebraska Avenue, N.W., N100B, Washington, D.C. 20016

(o) 202.274.4457 · niwap@wcl.american.edu · wcl.american.edu/niwap · <http://library.niwap.org/>

T visa and Continued Presence: The criminal activity is a severe form of trafficking in persons (which may include sex or labor trafficking)¹⁰

- “Helpfulness” or “Cooperation”
 - U visa: The statute makes U visas available to a victim who “is being, has been, or is likely to be” helpful.¹¹ Judicial certifications are most often made based on present or past helpfulness.¹²
 - T visa: T visa applicants are required to cooperate with “reasonable request for assistance” in the investigation or prosecution of their trafficker. The reasonableness of the request will be determined considering the totality of the circumstances in the case.¹³ A victim does not need to comply with the request for assistance if they are under eighteen or “experienced physical or psychological trauma that prevents him or her from complying.”¹⁴ Continued Presence: A victim of a severe form of human trafficking is eligible for Continued Presence whether or not they have provided helpfulness or cooperation. DHS encourages early identification and expeditious application for Continued Presence on behalf of victims who “may be a potential witness.”¹⁵ It is sufficient if there is some indication that the victim “has information that could be helpful to the investigation or prosecution of the trafficker,” but the victim does not need to be a testifying witness.¹⁶
- The following are judicial officers who can sign U and T visa certifications:
 - Any 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, aldermen, judicial referees, surrogates, masters, and chancellors.¹⁷
 - The U and T visa certifications may be signed by *any* judicial official. The judge signing the U or T visa certification may, but need not be, the judge who presided over a case

¹⁰ DHS T AND U VISA RESOURCE GUIDE, at 9; *see also* CONTINUED PRESENCE RESOURCE GUIDE, at 7 (Victim of a severe form of human trafficking is defined in 22 U.S.C. § 7102 as when a person is subjected to:

- (a) Sex trafficking, which is the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for a commercial sex act either induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (b) Forced labor, which is the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery).

¹¹ *See* 8 U.S.C. § 1101(a)(15)(U)(i)(II-III); *see also* DHS T and U Visa Resource Guide, at 4, 7.

¹² This helpfulness standard that applies to qualify for certification, is a different standard than applies once a victim files their U visa application. After filing the U visa victim has a future responsibility to cooperate or provide assistance that is reasonably requested by a government agency investigating or prosecuting the criminal activity. There is a statutory exception to this requirement. Victims who do not assist or cooperate when reasonably request can show that they did not unreasonably refuse to cooperate. INA § 245(m).

¹³ T VISA RESOURCE GUIDE at 5.

¹⁴ DHS T AND U VISA RESOURCE GUIDE, at 12; *see also* T VISA RESOURCE GUIDE at 5.

¹⁵ CONTINUED PRESENCE RESOURCE GUIDE at 6.

¹⁶ CONTINUED PRESENCE RESOURCE GUIDE, at 7.

¹⁷ DHS T AND U VISA RESOURCE GUIDE, at 16 and 11.

involving the victim seeking certification. In several jurisdictions one judge is assigned to complete certifications for case heard by any judge in that court.¹⁸

- Continued Presence: *Judges do not filed Continued Presence applications for human trafficking victims.* Judges that identify a victim who may be eligible for Continued Presence should refer them to a federal law enforcement or other government agency authorized to file Continued Presence applications.¹⁹ Judges help lead efforts in their jurisdictions to develop the relationships needed between the courts, state and local law enforcement, and federal government agencies to secure Continued Presence for adult and child victims of human trafficking that courts encounter.²⁰
- Courts detect criminal activity in a wide range of court cases including but not limited to the following civil and family court cases:
 - Protection orders;²¹
 - Custody;²²
 - Child abuse;²³
 - Elder abuse;²⁴
 - Disabled or dependent adult abuse;²⁵
 - Dating violence;²⁶
 - Employment and labor cases;²⁷ and
 - Civil actions.²⁸
- There is no statute of limitations on when the criminal activity being certified occurred.²⁹
 - The criminal activity “may have happened many years ago or recently.”³⁰
 - A certification can be submitted for a victim in a closed case.³¹
- Judges may amend Part 6 of the U visa certification or Part F of the T visa declaration by –
 - Crossing out “Based upon investigation of the facts” and replacing that language on the certification form to reflect the factual basis for the court’s certification, such as:³²
 - “Based on my findings and issuance of a protection order.”

¹⁸ See e.g., San Francisco Superior Court Civil Division U Visa Certification Protocol, <http://niwaplibrary.wcl.american.edu/pubs/san-francisco-court-civil-division-u-visa-certification-protocol/>; see also U Visa Certification and T Visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers at 22 (2021) [Hereinafter U AND T VISA GUIDE FOR JUDGES], <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>.

¹⁹ CONTINUED PRESENCE RESOURCE GUIDE, at 7.

²⁰ CONTINUED PRESENCE RESOURCE GUIDE, at 7.

²¹ DHS T AND U VISA RESOURCE GUIDE, at 19, 22.

²² DHS T AND U VISA RESOURCE GUIDE, at 19.

²³ DHS T AND U VISA RESOURCE GUIDE, at 15, 19, 22.

²⁴ DHS T AND U VISA RESOURCE GUIDE, at 22, 23.

²⁵ DHS T AND U VISA RESOURCE GUIDE, at 22, 23.

²⁶ DHS T AND U VISA RESOURCE GUIDE, at 23.

²⁷ DHS T AND U VISA RESOURCE GUIDE, at 6, 15; see also New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,019 (Sept. 17, 2007); see also 8 C.F.R. 214.14(a)(2).

²⁸ CONTINUED PRESENCE RESOURCE GUIDE, at 13.

²⁹ DHS T AND U VISA RESOURCE GUIDE, at 7, 19.

³⁰ DHS T AND U VISA RESOURCE GUIDE, at 7.

³¹ DHS T AND U VISA RESOURCE GUIDE, at 4.

³² U AND T VISA GUIDE FOR JUDGES, at 10, 21.

- “Based on my finding of probable cause.”
 - “Based on my findings in a (custody/divorce/child abuse) case”.
 - “Based upon my presiding over the case and hearing evidence.”
 - “Based on my review of court records.”
- To comply with judicial ethical canons that require judges to preserve their impartiality, judges who sign certifications commonly cross out the statement in Part 6 of the U visa certification or Part F of the T visa declaration, stating that the judge would notify USCIS should the victim unreasonably refuse to assist in the investigation or prosecution in the future.
 - Judges are required to maintain their roles as impartial triers of fact, and Judges would not likely have ongoing information about these facts.