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AMERICAN UNIVERSITY
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COLLEGE OF LAW

# The Categories of "Dual Intent" Nonimmigrant Visas Anticipate That Immigrants Can Permanently Remain in the United States

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March 25, 2014

Under the Higher Education Act of 1965, immigrant students can apply for and receive postsecondary educational grants and loans if they are "in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident."[1] Under the Immigration and Nationality Act and U.S. Department of Homeland Security policies and regulations there are some categories of immigrants who are considered dual intent immigrants. These immigrants have both a short-term intent to leave the United States and a long-term intent to remain permanently in the United States. There are a few types of *nonimmigrant* visa categories that meet all of the following criteria that make them eligible under the Education Act for postsecondary educational grants and loans. These are primarily U visa crime victims and T visa trafficking victims. They qualify for postsecondary educational grants and loans because they:

- Are dual intent visa holders;
- Have a path to lawful permanent residency directly connected to their nonimmigrant visa;
- They are eligible under U.S. immigration laws to self-petition for lawful permanent residency;
- They control their own immigration application for lawful permanent residency and are not dependent on a sponsor; and
- They are a category of nonimmigrants that are highly likely to file for and attain lawful permanent residency.

The Immigration and Nationality Act ("INA") uses the term "nonimmigrant" for visas that are generally granted to foreign-born persons who enter the U.S. for a temporary period of time.[2] Nonimmigrant visas are limited consistent with the particular purpose of the visa (i.e. visitor, student, employment, etc.). Nonimmigrants must generally represent to the Department of Homeland Security ("DHS") that the foreign-born person will only stay in the U.S. for a temporary period.

[1] 20 U.S.C. § 1091(a)(5) (hereinafter "Education Act").

[2] INA § 101(a)(15)(A)-(V), 8 U.S.C. 1101(a)(15)(A)-(V). *See also Non-Immigrant vs. Immigrant*, Entrepreneur Pathways, USCIS (last accessed Dec. 12, 2013), *available at*: http://www.uscis.gov/sites/default/files/USCIS/About%20Us/EIR/EIR-SlideShow/OverviewNew.html ("A nonimmigrant is a person temporarily admitted to the United States for reasons other than permanent residence. An immigrant is a person entering the United States to reside permanently. *All people arriving in the United States are considered immigrants until they have demonstrated nonimmigrant intent* (demonstrated that you will return to your home country) and have received approval by an inspecting officer to enter the country under one of the nonimmigrant visa classifications").

The INA uses the term "immigrant" for foreign-born persons who enter the U.S. with the intent to stay permanently.[3] Immigrants are more likely than nonimmigrants to be subjected to numerical restrictions.

Most nonimmigrant visas require that the foreign-born person prove nonimmigrant intent. This generally requires proof that the foreign-born applicant has a permanent residence in her home country and that the applicant has no intention of abandoning her home country and remaining permanently in the United States.

However, some nonimmigrants are granted nonimmigrant visas when they have both a short-term intent to leave the United States and a long-term intent to remain permanently in the United States. While most nonimmigrant classifications do not allow for the individual to have immigrant intent (i.e. the intent to remain permanently in the United States), there are several forms of nonimmigrant visas that anticipate that the person receiving the visa will be eligible for and secure a path to lawful permanent residency and citizenship. These nonimmigrant visa classifications allow the individual to have both nonimmigrant and immigrant intent at the same time.

Practically applied, this allows individuals with certain forms of nonimmigrant visas to be able to apply for and pursue lawful permanent residency while in a nonimmigrant status. This is called dual intent. Under the Dual Intent Doctrine[4], some nonimmigrants are allowed to enter and/or remain in the U.S. temporarily with a nonimmigrant visa even though they have expressed a long-term intent to remain permanently.

The Board of Immigration Appeals ("BIA") has held that "a desire to remain in this country permanently in accordance with the law, should the opportunity to do so present itself, is not necessarily inconsistent with lawful nonimmigrant status."[5] The Immigration and Naturalization Service ("INS"), the agency that became part of the Department of Homeland Security ("DHS"), has confirmed that the desire to obtain permanent residence in the future, by itself, does not automatically disqualify an alien from admission as a nonimmigrant.[6] A person might enter the U.S. with alternative plans in mind. Thus, a nonimmigrant may enter with the intent to remain only temporarily, but with the hope of acquiring lawful permanent resident status someday if the law permits it.

U Visa

The Violence Against Women Act of 2000 ("VAWA 2000")[7] created the U visa for immigrant victims of qualifying criminal activities.[8] This visa offers temporary lawful

[3] INA § 101(a)(15)(A); 8 U.S.C. 1101(a)(15)(A).
[4] IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 759-60 (AM. IMMIGR. COUNCIL, 13th ed. 2012).
[5] *Matter of Hosseinpour*, 15 I. & N. Dec. 191, 192 (BIA 1975) (citing *Brownell v. Carija*, 254 F.2d 78, 80 (D.C.Cir.1957); *Bong Youn Choy v. Barber*, 279 F.2d 642, 646 (C.A. 9, 1960).
[6] Legal Op. No. 97-5 of David Martin, INS General Counsel, entitled "The Effect of an Intent to Immigrate Permanently on an Alien's Inadmissibility as a Nonimmigrant," (Apr. 8, 1997) (citing *Matter of Hosseinpour*, 15 I&N Dec. 191, 192 (BIA 1975)).
[7] Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.
[8] INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I). Qualifying criminal activity is defined as being an activity involving one or more activities that violate U.S. criminal law, including: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, genital female mutilation, felonious assault, hostage, incest, involuntary servitude, kidnapping manslaughter, murder, obstruction

immigration status to victims of certain criminal activities if the victim has suffered substantial physical or mental abuse as a result of the criminal activity.[9] The victim must have information about the criminal activity and a law enforcement official (e.g., police, prosecutor), a judge, a child or elder abuse agency, the Equal Employment Opportunity Commission, the U.S. Department of Labor, a state department of labor, or other government agency eligible to certify U visas under DHS regulations must certify that the victim has been helpful, is being helpful, or is likely to be helpful in detecting, investigating or prosecuting the criminal activity.[10]

U visa status is a nonimmigrant status granted for four years, but extensions are available if the certifying agency shows that the petitioner's presence in the U.S. is required to assist in the investigation or prosecution of the qualifying criminal activity.[11] In addition, the U visa statutorily includes a path to lawful permanent residency.[12] Individuals, who have been physically present in the U.S. for a continuous period of at least three years since the date of admission as a U nonimmigrant and who have not unreasonably refused to provide assistance to law enforcement since receiving their U nonimmigrant visa, may apply for permanent residence, as long as the U visa holder can demonstrate eligibility based upon humanitarian need, public interest or family unity.[13] In the case of the U visa one of the requirements of eligibility to attain legal permanent resident status as a U visa holder is to have been granted U visa *nonimmigrant* status and be a U visa *nonimmigrant* at the time of application.[14]

When the U visa nonimmigrant status was created, Congress included a path to lawful permanent residency for the vast majority of U visa applicants. This path was created because Congress understood that victims involved in the detection, investigation, prosecution, conviction or sentencing of crime perpetrators would be at grave risk of retaliation and coercion from crime perpetrators and would need to remain safely in the U.S. where they could continue to be protected by U.S. laws.[15]

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of justice, peonage, perjury, fraud in foreign labor contracting, prostitution, rape, sexual assault, sexual exploitation, stalking, slave trade, torture, trafficking, witness tampering, unlawful criminal restraint, and other related crimes.

[9] INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

[10] *Id*.

[11] New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53028 (Sept. 17, 2007). 8 C.F.R. § 214.14(g) (2008).

[12] INA § 245(m); 8 U.S.C. § 1255(m); 8 C.F.R. §§ 245.23, 245.24 (2008).

[13] *Id.*

[14] *Id.* In order to be eligible for lawful permanent residence, a U-visa holder must prove that she was lawfully admitted to the U.S. as a U visa nonimmigrant, continues to hold that status (and it has not been revoked), is not inadmissible under INA §212(a)(3)(E) (Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing), has been physically present for three years, has cooperated in an investigation of the criminal activity upon which the U-visa was granted, and that her presence is justified "on humanitarian grounds, to ensure family unity, or is in the public interest." *See also* Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75549 (Dec. 1, 2008).

[15] Congressional Record October 11, 2000, Kennedy ("One of the most important provisions in the bill is the Battered Immigrant Protection Act. This provision helps battered immigrants by restoring access to a variety of legal protections undermined by the 1996 immigration laws. The Violence Against Women Act passed in 1994 included provisions that allowed battered immigrants to apply for legal status without the cooperation of their abusers, and enabled victims to seek protective orders and cooperate with law enforcement officials to prosecute crimes of domestic violence. Unfortunately, the subsequent changes in immigration laws have reduced access to those protections. Thousands of battered immigrants are again being forced to remain in abusive relationships, out of fear of being deported or losing their children. The pending bill removes obstacles currently hindering the ability of battered immigrants to escape domestic violence safely and prosecute their abusers... These and other important measures will do a great deal to protect battered immigrants and their children from domestic violence and free them from the fear that often prevents them from prosecuting these crimes. Congress enacted the Violence Against Women Act in 1994 to help all victims of domestic violence, regardless of their citizenship. It is long past time to restore and expand these protections." S10170) Boxer ("We also …look at battered immigrants, which is a very important issue, because we sometimes have people coming here who don't understand their rights. They need to understand their rights, that their bodies don't belong to anyone else, and they have a right to cry out if they are abused." 10173) Leahy ("In 1994, we designed VAWA to prevent abusive husbands from using control over their wives' immigration status to control them. Over the ensuing six years we have discovered additional areas that need to be addressed to protect immigrant women from abuse, and have attempted to do so in this legislation. VAWA II will ensure that the immigration status of battered women will not be affected by changes in the status of their

The legislative history of VAWA 2000 states as follows:[16]

**SEC. 1502. FINDINGS AND PURPOSES.**

(a) FINDINGS.—Congress finds that—

(1) The goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships;
(2) Providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control; and
(3) There are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.

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abusers. It will also make it easier for abused women and their children to become lawful permanent residents and obtain cancellation of removal. With this legislation, battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States. I am pleased that we have taken these additional steps to protect immigrant women facing domestic abuse in the United States. I would also like to point out the difficult situation of immigrant women who face domestic violence if they are returned to their home country." 10185); Hatch (In discussing the U visa and VAWA immigration protections Senator Hatch stated: "Finally, it makes important revisions to the immigration laws to protect battered immigrant women." 10191); Hatch-Biden ("*Sec. 1513. Protection for Certain Crime Victims Including Victims of Crimes Against Women* Creates new nonimmigrant visa for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status if the victim has suffered substantial physical or mental abuse as a result of the crime, the victim has information about the crime, and a law enforcement official or a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime. …Allows Attorney General to adjust these individuals to lawful permanent resident status if the alien has been present for 3 years and the Attorney General determines this is justified on humanitarian grounds, to promote family unity, or is otherwise in the public interest." 10196); Biden ("Also, maybe the single most important provision we add to the Violence Against Women Act is the battered immigrant women provision. 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." 10204 and "And let's not forget the plight of battered immigrant women, caught between their desperate desire to flee their abusers and their desperate desire to remain in the United States. A young Mexican woman who married her husband at the age of 16 and moved to the United States suffered years of physical abuse and rape—she was literally locked in her own home like a prisoner. Her husband threatened deportation if she ever told police or left the house. When she finally escaped to the Houston Area Women's Center in Texas, she was near death. That shelter gave her a safe place to live, and provided her the legal services she needed to become a citizens and get a divorce" 10205.); Brownback ("Finally, I am very pleased that the conference report includes the core provisions from the Senate bill that I developed along with Senator KENNEDY, Senator HATCH, and Senator BIDEN to address ways in which our immigration laws remain susceptible of misuse by abusive spouses as a tool to blackmail and control the abuse victim…. Of all the victims of domestic abuse, the immigrant dependent on an abusive spouse for her right to be in this country faces some of the most severe problems. In addition to the ordinary difficulties that confront anyone trying to deal with an abusive relationship, the battered immigrant also is afraid that if she goes to the authorities, she risks deportation at the instance of her abusive spouse, and either having her children deported too or being separated from them and unable to protect them. We in Congress who write the immigration laws have a responsibility to do what we can to make sure they are not misused in this fashion. That is why I am so pleased that the final version of this legislation includes this and other important provisions." 10219-10220); Bingaman ("The battered immigrant women provision is also important to many New Mexico residents. No longer will battered immigrant women and children be faced with deportation for reporting an abuser on whom they may be dependent on for an immigration benefit. No person residing in the United States should be immune from prosecution for committing a violent crime because of a loophole in an immigration law." 10223-10224).

[16] Violence Against Women Act of 2000 Section 1502(a) and (b), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. No. 106-939 (2000) (Conf. Rep.).

(b) PURPOSES.—The purposes of this title are—

(1) To remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and
(2) To offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.

The legislative history of the U visa protections included in VAWA 2000 further states:[17]

**SEC. 1513. 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 rape, torture, kidnapping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.
(B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.

(2) PURPOSE.—

(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)(15)(U)(iii) 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. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.
(B) Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It

[17] Violence Against Women Act of 2000 Section 1513(a), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. No. 106-939 (2000) (Conf. Rep.).

also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions. Providing temporary legal status to aliens who have been severely victimized by criminal activity also comports with the humanitarian interests of the United States.

(C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

All but a very small percentage (between .02% and .54%) of U visa holders will qualify for and will attain lawful permanent residency through the U visa program.[18] Further, in 99.45% of the U visa cases the applicants had either provided ongoing cooperation (70%) or were willing to provide additional cooperation beyond the helpfulness provided prior to attaining certification, but were not being asked for additional cooperation (29.45%).[19] Since the overwhelming majority of U visa holders will apply for and will qualify to receive lawful permanent residency through the U visa program, U visa holders are excellent examples of immigrants with dual intent to remain in the U.S. despite the fact that their U visa is a nonimmigrant visa. The U visa holder like other dual intent visa holders, they have a path to and in all but a few cases the intent to pursue lawful permanent residency. The U visa holders' case is similar to the most common dual intent visas which are employment-based visas -- the E,[20] H,[21] L,[22] O,[23] P,[24] and R[25] visas. These visa holders may pursue permanent residency while maintaining their nonimmigrant status.[26]

Why U Visas Are Dual Intent Visas

U visas are humanitarian visas issued to immigrant crime victims have been, are or are likely to be helpful to crime detection, investigation, prosecution, conviction, or sentencing.[27] The purpose of these types of visas is to provide protection from deportation, services, and stability for victims of criminal activity perpetrated in the United States.[28]

All U visa victims have come forward, reported criminal activity, and provided help to law enforcement in the detection, investigation, prosecution, conviction or sentencing of criminal

[18] LESLYE ORLOFF, LEVI WOLBERG, AND BENISH ANVER, U-VISA VICTIMS AND LAWFUL PERMANENT RESIDENCY (Sep. 6, 2012), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/education-financial-aid/U-Visas-and-Lawful-Permanent-Residency.pdf/view (This survey found that 21.3% of the U-visa applicants had been granted legal permanent residency; 6.0% of the applicants had already filed and had pending applications for lawful permanent residency. Among the remaining U visa holders and U visa applicants 72.5% qualified to file for lawful permanent residency based upon humanitarian need, public interest or family unity. Only 0.2% did not plan to file for lawful permanent residency).

[19] *Id.*

[20] INA § 101(a)(15)(E)(i); 8 U.S.C §1101(a)(15)(E)(i); INA §101(a)(15)(E)(ii), 8 U.S.C. §1101(a)(15)(E)(ii); 22 C.F.R. §41.51.

[21] INA §101(a)(15)(H); 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. §214.2(h).

[22] INA §101(a)(15)(L); 8 U.S.C. §1101(a)(15)(L); 8C.F.R. §214.2(l).

[23] INA §101(a)(15)(O); 8 U.S.C. §1101(a)(15)(O); 8 C.F.R. §214.2(o)(1)(i).

[24] INA §101(a)(15)(P); 8 U.S.C. §1101(a)(15)(P); 8 C.F.R. §214.2(p).

[25] INA §101(a)(15)(R); 8 U.S.C. §1101(a)(15)(R); 22 C.F.R. §41.58; 8 C.F.R. §214.2(r).

[26] IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 759 (AM. IMMIGR. COUNCIL, 13th ed. 2012).

[27] U.S. DEPARTMENT OF HOMELAND SECURITY, U VISA LAW ENFORCEMENT CERTIFICATION RESOURCE GUIDE 1-4 (2012), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/government-memoranda-and-factsheets/dhs_u_visa_certification_guide.pdf

[28] Violence Against Women Act of 2000 Section 1513(a), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. No. 106-939 (2000) (Conf. Rep.).

perpetrators.[29] The INA and DHS implementing regulations require this helpfulness and ongoing cooperation once the U visa is granted. The more that a victim cooperates with law enforcement, the more likely the victim will be threatened or targeted by their assailants.

Once the period of the visa holder's temporary stay expires, if victims who have been helpful or who have been cooperating with law enforcement are required to return to their home countries, many victims are at grave risk of retaliation from human traffickers, batterers, sexual assault and other crime perpetrators abroad. Since cooperation with criminal investigations and prosecutions can lead to the noncitizen perpetrator's removal from the United States, the perpetrator poses a danger to victims who are removed from or leave the United States. Perpetrators who are U.S. citizens, lawful permanent residents or immigrants with visas that allow travel to and from the United States are able to follow victims who are forced to leave the country and retaliate. Perpetrators of U visa domestic violence, sexual assault, stalking, trafficking and other U visa covered crimes threaten to harm the victims or their families abroad and can and do act on these threats of retaliation. For this reason, the U visa includes a path to permanent residency for U visa victims of criminal activity.[30]

The vast majority (99.8%) of U visa applicants and U visa holders know that they will qualify for lawful permanent residency through the U visa program based upon humanitarian need, public interest or family unity so long as they cooperate or do not unreasonably refuse to cooperate with reasonable requests for assistance once their U visa has been granted.[31] Seventy percent of U visa recipients provide ongoing cooperation to law enforcement and another 29.45% are willing to cooperate but for a range of reasons are not asked for further cooperation beyond what they initially provided to law enforcement.[32]

If the perpetrator is a noncitizen and is convicted of a U visa criminal activity, in the vast majority of cases the perpetrator will be turned over to DHS for removal from the United States upon completion of his sentence.[33] These facts can form the basis of a grant for lawful permanent residency to a U visa victim based upon humanitarian need.

Many times, U visa holders have U.S. born children. When the perpetrator is the citizen parent of the U visa victim's child, the victim's removal from the U.S. at the end of the U visa period could result in the child being placed in the custody of the abusive parent which is contrary to state best interests of the child custody statutes. Under the U visa, the crime victim immigrant parent would be able to attain lawful permanent residency based upon family unity to be able to remain in the U.S. under the protection of U.S. laws and care for her children.

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[29] *See* New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53014, 53020 (Sept. 17, 2007).

[30] INA § 245(I); 8 U.S.C.A. 1255(m); 8 C.F.R. § 245.24(b).

[31] LESLYE ORLOFF, LEVI WOLBERG, AND BENISH ANVER, U-VISA VICTIMS AND LAWFUL PERMANENT RESIDENCY (Sep. 6, 2012), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/education-financial-aid/U-Visas-and-Lawful-Permanent-Residency.pdf/view

[32] *Id*.

[33] *See* Immigration and Customs Enforcement, U.S. Department of Homeland Security, *ICE Detainers: Frequently Asked Questions* (Dec. 2012), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/detainer-faqs%20Dec%202012.pdf; *see also* Immigration and Customs Enforcement, U.S. Department of Homeland Security, *Immigration Detainer- Notice of Action*, available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/forms/Detainer%20Form.pdf

If the perpetrator is a noncitizen and the children are U.S. born, when the perpetrator is removed from the United States the only avenue to protect the children and their U visa holder parent from retaliation is through U visa lawful permanent residency granted for family unity and humanitarian need.

U visa holders in the vast majority of cases have, or over the course of the criminal case develop, the intent to remain in the United States under the protection of U.S. laws, although their U visa is a nonimmigrant visas.[34] These visa holders are better protected from perpetrator retaliation in the U.S. If they are forced to return to their home countries, they are subject to retaliation for their involvement with law enforcement in the criminal case against their assailants.

In comparison with other nonimmigrant visas (such as student, visitor visas, temporary workers) where the intent is explicitly stated to return to the visa holders' home countries, U visa holders lack this intent to return due to safety concerns and often a significant risk of danger. Many times, the perpetrator and victim come from the same country. The perpetrator may be a naturalized citizen or lawful permanent resident with the ability to travel freely between the home country and the U.S. noncitizen perpetrators can be removed based on criminal convictions that resulted from the U visa victim's helpfulness and cooperation with law enforcement. If required to return, the victims would be at a much greater risk than if they remained permanently in the U.S. This humanitarian need to remain in the U.S. and the public interest involved in encouraging immigrant crime victims to come forward, report crimes and participate in criminal investigations or prosecutions work together to form the grounds for granting lawful permanent residency to U visa holders.

Additionally, many U visa crime victims receive a range of crime victim services available to noncitizen crime victims in the U.S. offered to victims at the state level with the Victims of Crime Act,[35] Violence Against Women Act[36] and Family Violence Prevention and Services Act[37] funding. Such victims are also eligible to receive a variety of services necessary to protect life and safety.[38] Some states offer state funded public benefits to U visa applicants and U visa holders receive access to prenatal and child healthcare in the U.S. [39] These services may not be available in the victim's home country. Therefore, if the U visas were nonimmigrant visas only, U visa victims would lose access to this assistance if they were required to leave the U.S. Instead these factors contribute to their ability to remain permanently in the U.S. based upon humanitarian need.

Comparison of U Visa and Current Dual Intent Visas for Purposes of Educational Benefits

[34] *See* LESLYE ORLOFF, LEVI WOLBERG, & BENISH ANVER, U-VISA VICTIMS AND LAWFUL PERMANENT RESIDENCY (Sept. 6, 2012), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/research-US-VAIW/U-Visas-and-Lawful-Permanent-Residency.pdf

[35] Victims of Crime Act of 1984, 42 U.S.C.A. § 10601 (West 2006).

[36] Violence Against Women Reauthorization Act of 2013, Pub. L. 113-4, 127 Stat. 54 § 101; 42 U.S.C. §§ 3711 *et seq*.; *see also id*. at § 102(a)(1)(A)(15); 42 U.S.C. § 3796hh(b)(15).

[37] Family Violence Prevention and Services Act, 42 U.S.C. § 10401 *et seq*. (2010).

[38] U.S. Department of Justice, Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613, 3613-16 (A.G. Order No. 2353-2001) (Jan. 16, 2001), available at: http://niwaplibrary.wcl.american.edu/public-benefits/unrestricted-benefits/AG_order.protection_life_or_safety.pdf

[39] *See* LESLYE ORLOFF, ADITI KUMAR, & KRISZTINA SZABO, PUBLIC BENEFITS TOOLKIT (updated Mar. 2014), available at:

Current dual intent visas include O,[40] P,[41] K,[42] H,[43] L,[44] R,[45] and E[46] visas.

The O-1 visa is for temporary workers or trainees with extraordinary ability who are authorized to only work for a specific employer.[47] O visa recipients may also qualify as priority workers.[48] Most O-1 visa holders self-petition for lawful permanent residency as EB-1 immigrant visa holders.[49] O-1 visa holders who self-petition EB-1 based lawful permanent residency are generally the O-1s who are at the top of their field and can show extraordinary ability.[50] They have to have attained national acclaim in their home country in field of arts, sciences, sports, television – they are the very top of their field and they are able to self-petition based upon their extraordinary ability.[51] Some O-1's can have an employer sponsor them to get LPR status – but this is rare.[52]

Examples of persons who have held O-1 visas and self-petitioned for lawful permanent residency under the EB-1 program are Dallas Mavericks forward Dirk Nowitzki, Canadian author Jennifer Gould Keil, Israeli concert pianist Inon Barnatan, and members of the New York dance companies Merce Cunningham and Bill T. Jones/Arnie Zane.[53] The Department of Homeland Security generally accepts that these types of workers enter on a temporary visa, despite the fact that that they intend to stay permanently. This category of O-1 visa holders would qualify for postsecondary grants and loans because they are dual intent visa holders who can self-petition for lawful permanent residency.[54] However, the nature of their work, their income and having already excelled in their careers makes them highly unlikely to need or to qualify to apply for such grants or loans based upon their economic status.

Another dual intent visa is for individuals with P-1 visa.[55] This is for athletes or entertainers who may qualify as priority workers.[56] Generally, these visa holders need a *sponsoring* employer to apply for a visa that will eventually result in lawful permanent residency.[57] If a worker in P-1 status can show extraordinary ability, they may be able to self-petition using the EB-1 visa

[40] INA §101(a)(15)(O); 8 U.S.C. §1101(a)(15)(O); 8 C.F.R. §214.2(o)(1)(i).
[41] INA §101(a)(15)(P); 8 U.S.C. §1101(a)(15)(P); 8 C.F.R. §214.2(p).
[42] INA §101(a)(15)(K); 8 U.S.C. §1101(a)(15)(K); 8 C.F.R. §214.2(k).
[43] INA §101(a)(15)(H); 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. §214.2(h).
[44] INA §101(a)(15)(L); 8 U.S.C. §1101(a)(15)(L); 8C.F.R. §214.2(l).
[45] INA §101(a)(15)(R); 8 U.S.C. §1101(a)(15)(R); 22 C.F.R. §41.58; 8 C.F.R. §214.2(r).
[46] INA § 101(a)(15)(E)(i); 8 U.S.C §1101(a)(15)(E)(i); INA §101(a)(15)(E)(ii), 8 U.S.C. §1101(a)(15)(E)(ii); 22 C.F.R. §41.51.
[47] INA §101(a)(15)(O); 8 U.S.C. §1101(a)(15)(O); 8 C.F.R. §214.2(o)(1)(i).
[48] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, O-1 Visa: Individuals with Extraordinary Ability or Achievement, http://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-1-visa-individuals-extraordinary-ability-or-achievement
[49] *Id*.
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] Moira Herbst, *Immigration: When Only 'Geniuses' Need Apply*, Bloomberg Businessweek, May 17, 2009, *available at* http://www.businessweek.com/bwdaily/dnflash/content/may2009/db20090517_864505.htm.
[54] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, O-1 Visa: Individuals with Extraordinary Ability or Achievement, http://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-1-visa-individuals-extraordinary-ability-or-achievement
[55] INA §101(a)(15)(P); 8 U.S.C. §1101(a)(15)(P); 8 C.F.R. §214.2(p).
[56] *Id*.
[57] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, P-1A Visa: Internationally Recognized Athlete, http://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete; *see also* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, P-1B Visa: P-1B Member of an Internationally Recognized Entertainment Group, http://www.uscis.gov/working-united-states/temporary-workers/p-1b-member-internationally-recognized-entertainment-group/p-1b-member-internationally-recognized-entertainment-group

program; however, this is rare.[58] Usually P visa holders do not stay in the U.S. and do not file for lawful permanent residency.[59] If they do, they have usually shown extraordinary ability (EB-1) and will self-petition.[60] This category of visa holders may have dual intent, but would not qualify for postsecondary educational grants and loans under the Education Act because, as a group, they are highly unlikely to attain lawful permanent residency and, when they do qualify, they must rely on a sponsor and only in rare circumstances do they self-petition through the EB-1 program.

H-1B visa holders are temporary specialized workers who are authorized to work for only a specific employer.[61] Many H-1B workers work for technology companies (e.g. Dell, Texas Instruments, Microsoft).[62] These workers also qualify under the dual intent visa category.[63] Most of these workers attain lawful permanent residency through employer sponsorship through the EB-2 and EB-3 visa programs.[64] A small number of these visa holders may attain lawful permanent residency through family sponsorship. H-1B visa holders must have family or employment based *sponsorship* and they must wait for a visa to become available before they can apply for lawful permanent residency. As a result, H-1B visa holders would not qualify under the Education Act for postsecondary educational grants or loans, because although they are dual intent visa holders they cannot self-petition and cannot control when or whether they will attain lawful permanent residency.

Spouses and fiancés of U.S. citizens are excellent examples of dual intent visas that can be quite similar to the domestic violence victims possessing the U visa. Fiancés and spouses of U.S. citizens, like U visa family violence victims whose perpetrators are U.S. citizens, legal permanent residents, or visa holding family members, receive temporary nonimmigrant visas that include a path to lawful permanent residency. Fiancées of U.S. citizens and their children receive K-1 and K-2 nonimmigrant visas.[65] The fiancé visa is a temporary nonimmigrant visa that allows a foreign-born fiancé of a U.S. citizen to enter the United States and requires that they marry the sponsoring spouse within 90 days.[66] Following the marriage, the U.S. citizen spouse must file a family-based visa petition sponsoring the foreign-born spouse for lawful permanent residency.[67] Spouses of U.S. citizens and their children entering the U.S. from abroad receive K-3 and K-4 nonimmigrant visas.[68] For a K visa nonimmigrant spouse to obtain lawful

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[58] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Employment-Based Immigration: First-Preference EB-1, http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1

[59] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, P-1A Visa: Internationally Recognized Athlete, http://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete; *see also See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, P-1B Visa: P-1B Member of an Internationally Recognized Entertainment Group, http://www.uscis.gov/working-united-states/temporary-workers/p-1b-member-internationally-recognized-entertainment-group/p-1b-member-internationally-recognized-entertainment-group

[60] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Employment-Based Immigration: First-Preference EB-1, http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1

[61] INA §101(a)(15)(H); 8 U.S.C. 1101(a)(15)(H); 8 C.F.R. §214.2(h).

[62] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models

[63] *Id*.

[64] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Employment-Based Immigration: Second Preference EB-2, http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-second-preference-eb-2; *see also* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Employment-Based Immigration: Third Preference EB-3, http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3

[65] INA §101(a)(15)(K); 8 U.S.C. §1101(a)(15)(K); 8 C.F.R. §214.2(k).

[66] INA § 101(a)(15)(K)(i); 8 U.S.C. §1101(a)(15)(K)(i); 8 C.F.R. §214.2(k)(5).

[67] INA § 245(k); 8 U.S.C. §1255(k); 8 C.F.R. §214.2(k)(6).

[68] INA §101(a)(15)(K); 8 U.S.C. §1101(a)(15)(K); 8 C.F.R. §214.2(k).

permanent residency the citizen spouse must file a family-based visa petition for the spouse.[69] The nonimmigrant visa allows the immigrant spouse or fiancé to enter the U.S. and remain in the U.S. while her partner files and receives approval of her application for lawful permanent residency for a family-based visa petition.[70] For K visa holders to become lawful permanent residents they must be *sponsored* by the U.S. citizen or lawful permanent resident spouse or parent.[71] Therefore, K visa holders do not control when or whether their application for lawful permanent residency is filed and are another example of dual intent visa holders who would not qualify to postsecondary educational grants and loans until their lawful permanent residency application has been filed.

An L-1 visa holder is a foreign worker who is an intercompany transferee authorized to work for only a specific employer.[72] To qualify under this category the employee must work for a global company that has at least one office abroad.[73] These are specifically international companies such as Exxon, Mobil, Samsung, Toyota who *sponsor* the L visa holder. L visas are dual intent visas in which the employee first receives a temporary L visa and later can obtain *sponsorship* from an employer or family member to receive lawful permanent residency.[74] Since the L visa holder could have dual intent to remain in the United States but would not be able to self-petition for lawful permanent residency, she would not be eligible to receive post secondary educational grants or loans under the Education Act.

Religious workers can receive R-1 nonimmigrant visas that are considered dual intent visas.[75] These individuals are authorized to work for specific faith based employers.[76] For religious worker visa holders to attain lawful permanent residency they must be *sponsored* by an employer or family member.[77] Dual intent religious workers would only qualify for postsecondary educational grants or loans if and when their employer or family member sponsored them and filed a lawful permanent residency application on their behalf.

Some visa holders are classified as having limited dual intent.[78] This means that these individuals must keep ties in their home country, but may intend to stay in the U.S. permanently. E-1 and E-2 visa holders for treaty investors and traders are limited dual intent visas.[79] For lawful permanent residency E-1 and E-2 visa holders need *sponsorship* by an employer or family member and as a result they would not qualify for postsecondary educational grants or loans under the Education Act.

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[69] INA § 245(k); 8 U.S.C. §1255(k); 8 C.F.R. §214.2(k)(6).

[70] *Id.*

[71] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Bringing Spouses to Live in the United States as Permanent Residents, http://www.uscis.gov/family/family-us-citizens/spouse/bringing-spouses-live-united-states-permanent-residents

[72] INA §101(a)(15)(L); 8 U.S.C. §1101(a)(15)(L); 8C.F.R. §214.2(l).

[73] *Id.*

[74] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Employment-Based Immigration: Third Preference EB-3, http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-third-preference-eb-3

[75] INA §101(a)(15)(R); 8 U.S.C. §1101(a)(15)(R); 22 C.F.R. §41.58; 8 C.F.R. §214.2(r).

[76] *Id.*

[77] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, Employment-Based Immigration: Fourth Preference EB-4 http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fourth-preference-eb-4

[78] IRA J. KURZBAN, IMMIGRATION LAW SOURCEBOOK 759 (AM. IMMIGR. COUNCIL, 13th ed. 2012).

[79] *See* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, E-1 Treaty Traders, http://www.uscis.gov/working-united-states/temporary-workers/e-1-treaty-traders; *see also* U.S. Citizenship and Immigration Services, U.S. Department of Homeland Security, E-2 Treaty Investors http://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors

Dual Intent, Intent of Becoming a Citizen or Lawful Permanent Resident and Self-Petitioning Application vs. Sponsorship

Under the Education Act immigrants are eligible for postsecondary educational grants and loans if the "individual must demonstrate they are in the United States for other than a temporary purpose with the intention of becoming a citizen or permanent resident."[80] There are two factors that need to be considered in determining whether an immigrant meets this definition:

(1) Is the applicant in immigrant status or a nonimmigrant immigrant with a dual intent visa?
(2) If the nonimmigrant has a dual intent visa, can the nonimmigrant file her own application for lawful permanent residency or is he dependent on a sponsor who controls whether or not the nonimmigrant can receive lawful permanent residency?

If the immigrant is in the process of pursuing a form of immigration relief that includes a path to lawful permanent residency and the immigrant is able to file her own application for lawful permanent residency under immigration law, the immigrant should qualify for postsecondary educational grants and loans. The fact that an immigrant has a nonimmigrant visa does not preclude an immigrant from having the dual intent to, a path to, and the *intention of becoming a citizen or permanent resident*[81] required for access to postsecondary educational grants and loans. Examples of forms of immigration status that meet these factors include:

- VAWA self-petitioners with prima facie determinations
- T nonimmigrant visa holders (trafficking victims)
- U nonimmigrant visa holders (crime victims)
- Other nonimmigrant dual intent visa holders who may under some circumstances have a path to lawful permanent residency that does not require sponsorship
    - O nonimmigrant visa holders (workers of extraordinary ability)
    - P nonimmigrant visa holders (athletes or entertainers)

This lists the group of nonimmigrant visa holders that should be eligible for postsecondary educational benefits under the Education Act.[82] The groups listed above differ from other groups of nonimmigrant visa holders with dual intent in a significant way. Most nonimmigrant visa holders cannot file their own applications to attain lawful permanent residency. They must have a sponsor (family member or employer) who files an application for lawful permanent residency on the immigrant's behalf. The immigrants with E, H, K, L, R and some O and P nonimmigrant visas do not control or predict whether they will be able to apply for lawful permanent residency, although the immigrant may wish and, if an application is filed, have the intent to apply for lawful permanent residency.

In conclusion, the Department of Education should recognize that U visa holders, with U nonimmigrant visas, do have a path to lawful permanent residency that comes as part of the U visa process. U visas are dual intent visas in which U.S. immigration laws recognize and expect

[80] 20 U.S.C. § 1091
[81] *Id.*
[82] *Id.*

that U visa holders are on a path to receiving lawful permanent residency. Almost all (99.8%) of immigrant crime victims who come forward, report crimes, and obtain U visas, plan to, qualify for and do file for lawful permanent residency.[83] Thus, the Department of Education should allow U visa holders to apply for and receive postsecondary educational grants and loans. Eligibility should extend to both the U visa victims and their children who also receive U visas because they were included in their parents' applications.

[83] LESLYE ORLOFF, LEVI WOLBERG, AND BENISH ANVER, U-VISA VICTIMS AND LAWFUL PERMANENT RESIDENCY (Sep. 6, 2012), available at: http://niwaplibrary.wcl.american.edu/reference/additional-materials/public-benefits/education-financial-aid/U-Visas-and-Lawful-Permanent-Residency.pdf/view (99.8% of U visa applicants and recipients already know that they qualify for lawful permanent residency through the U visa before they file their U visa cases).