

Chevron doctrine and U visa certification

By Rafaela Rodrigues and Leslye E. Orloff

April 2, 2019 (Updated June 12, 2021)

The *Chevron*¹ *deference doctrine* requires that when a Congressional legislative delegation to a federal administrative agency on a particular issue or question is not explicit but rather implicit, a court may not substitute its own interpretation of the statute for a reasonable interpretation made by the federal administrative agency.² As part of the Violence Against Women Act of 2000 Congress created the U visa which offers immigration relief to immigrant victim of domestic violence, sexual assault, stalking, human trafficking and other serious criminal activities.³ In 2007, the U.S. Department of Homeland Security (DHS) published interim final U visa regulations,⁴ which have been supplemented by numerous DHS policies and publications on the U visa program.⁵ The U visa statute, regulations and DHS policies all consistently list judges as U visa certifiers.⁶ Despite this fact, some state and federal courts have issued opinions on U visa certification by judges concluding that judges are not allowed to sign U visa certifications.⁷ This conclusion is inconsistent with and contrary to the U visa statute and its legislative and regulatory history.⁸

Judges are specifically listed in the federal statute as one of the government officials authorized by statute to complete U visa certifications.⁹ When the U.S. Department of Homeland Security published the U visa regulations¹⁰ and certification forms DHS included judges as certifiers authorized to complete the U visa Certification Form I-918, Supplement B.¹¹ When a

¹ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 (1984)

² Mr Joe Hashmall, CHEVRON DEFERENCE LII / LEGAL INFORMATION INSTITUTE (2009), https://www.law.cornell.edu/wex/chevron_deference (last visited Apr 1, 2019).

³ 8 CFR § 214.14

⁴ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status 72 Fed. Reg. 53013 (Sept. 17, 2007) (to be codified at 8 CFR 103, 8 CFR 212, 8 CFR 214, 8 CFR 248, 8 CFR 274). <https://niwaplibrary.wcl.american.edu/pubs/federal-register-new-classification-victims-criminal-activity-eligibility-u-nonimmigrant-status-interim-rule>.

⁵ See e.g. DEPT. OF HOMELAND SECURITY, DHS U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE (2015), <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015>; DEPT. OF HOMELAND SECURITY, U VISA IMMIGRATION RELIEF FOR VICTIMS OF CERTAIN CRIMES: AN OVERVIEW FOR LAW ENFORCEMENT (2017), <https://niwaplibrary.wcl.american.edu/pubs/dhs-u-visa-overview-2017>

⁶ 8 CFR § 214.14(a)(2); 8 U.S.C. 1184(p)(1); DEPT. OF HOMELAND SECURITY, *supra* note 5 at 8.

⁷ Kendall Niles, Veronica Thronson & Leslye Orloff, *Understanding the Judicial Role in U Visa Certification*, 31 AM. J. FAM. LAW 208, 215.

⁸ *Id.* at 223.

⁹ INA sec. 214(p)(1), 8 U.S.C. 1184(p)(1) (“The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title[....]”)

¹⁰ 8 C.F.R.214.14(c)(2)(i)

¹¹ DEPT. OF HOMELAND SECURITY, FORM I-918 SUPPLEMENT B (MARCH 2017) (2017), <http://niwaplibrary.wcl.american.edu/pubs/form-i-918-supplement-b> (last visited Apr 1, 2019); DEPT. OF HOMELAND

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/>

certifying official, including a judge, signs a U visa certification that document informs DHS that the immigrant applicant is a victim of a listed criminal activity and describes how the victim is being, has been or is likely to be helpful to the court, law enforcement, prosecutors or other government officials in detection, investigation, prosecution, conviction or sentencing the criminal activity.¹² Obtaining a U visa certification is a required prerequisite to filing a U visa immigration case.¹³ The certification does not grant the victim immigration status,¹⁴ but rather provides evidence for DHS to consider in its adjudication of the victim's U visa application. The Department of Homeland Security (DHS) has sole authority to grant or deny a U visa.¹⁵ To obtain a U visa, a victim must meet eligibility requirements that go beyond, obtaining the required U visa certification.¹⁶

There have been discussions about whether in the future the U.S. Supreme Court might limit or restrict the application of the *Chevron* doctrine.¹⁷ Potential changes may include less freedom for agency action, increasing the role of courts in some complex areas of regulation and restricting the discretionary power of agencies to adjust policies¹⁸, or restricting the areas where *Chevron* doctrine should be applied.¹⁹ None of the potential limitations being discussed would change the fact that under the federal U visa statute²⁰ and under DHS regulations and policies state, federal and local judges are authorized to sign U visa certifications. The statute is not silent or ambiguous regarding the fact that judges can sign U visa certifications. As a result, should any of the proposed changes to *Chevron* deference become law, it is highly unlikely that such change would alter current regulatory procedures implementing the statutorily created judicial authority to sign U visa certifications, since the statute is clear on this particular issue.

SECURITY, I-918 SUPPLEMENT B INSTRUCTIONS (MARCH 2017) (2017), <http://niwaplibrary.wcl.american.edu/pubs/i-916-supplement-b-instructions> (last visited Apr 1, 2019).

¹² See LESLYE E ORLOFF ET AL., U VISA QUICK REFERENCE FOR JUDGES (2018).

¹³ 8 C.F.R.214.14(c)(2)(i)

¹⁴ DEPT. OF HOMELAND SECURITY, *supra* note 5 at 8.

¹⁵ *Id.* at 8.

¹⁶ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status 72 Fed. Reg. 53013, 53023-25 (Sept. 17, 2007) (to be codified at 8 CFR 103, 8 CFR 212, 8 CFR 214, 8 CFR 248, 8 CFR 274).

¹⁷ Amanda Reilly, WOULD KAVANAUGH LIMIT THE CHEVRON DOCTRINE? GREEN WIRE (2018), <https://www.eenews.net/stories/1060088675> (last visited Apr 1, 2019); Eric Citron, THE ROOTS AND LIMITS OF GORSUCH'S VIEWS ON CHEVRON DEFERENCE SCOTUSBLOG (2017), <https://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/> (last visited Apr 1, 2019); Joey Longley, GORSUCH OPINION IN EPIC SYSTEMS EXPRESSES OPENNESS TO RE-EXAMINATION OF CHEVRON NATIONAL CONSUMER LAW CENTER (2018), <https://www.nclc.org/issues/gorsuch-expresses-openness-to-reexamine-chevron.html> (last visited Apr 1, 2019).

¹⁸ Epic Systems Corp. v. Lewis, 138 U.S. 1612, 1630 (2018). See Joey Longley, GORSUCH OPINION IN EPIC SYSTEMS EXPRESSES OPENNESS TO RE-EXAMINATION OF CHEVRON NATIONAL CONSUMER LAW CENTER (2018); Eric Citron, THE ROOTS AND LIMITS OF GORSUCH'S VIEWS ON CHEVRON DEFERENCE SCOTUSBLOG (2017), <https://www.scotusblog.com/2017/03/roots-limits-gorsuchs-views-chevron-deference/>

¹⁹ Reilly, *supra* note 17.

²⁰ INA sec. 214(p)(1), 8 U.S.C. 1184(p)(1) (permitting judges to sign certifications on behalf of U nonimmigrant status applications).