

## U visas: Victims of Criminal Activity<sup>12</sup>

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### Introduction

The purpose of this chapter is to assist advocates and attorneys identify sexual assault, domestic violence, stalking, human trafficking, child abuse, elder abuse, hate crimes, and other crime victims who may be eligible for U visa immigration relief and to provide resources to help advocates and attorneys work together to prepare U visa applications for immigrant crime victims. This chapter provides practical tips for filing U visas that were created as part of the Violence Against Women Act (VAWA) of 2000,<sup>3</sup> and included amendments made in VAWA 2005,<sup>4</sup> VAWA 2013,<sup>5</sup> and the 2013 U.S. Supreme Court decision striking down provisions of the Defense of Marriage Act (DOMA)<sup>6</sup> which expanded access to VAWA's immigration protections and the ability of U visa

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<sup>2</sup> In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are navigating these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Likewise, The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all victims without regard to the victim's gender identity. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and the victim identifies as a woman. Therefore, we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim.

<sup>3</sup> VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT OF 2000, Pub. L. 106-386, 114 Stat. 1464 (2000).

<sup>4</sup> VIOLENCE AGAINST WOMEN AND DEPARTMENT OF JUSTICE REAUTHORIZATION ACT OF 2005, Pub. L. 109-162, 119 Stat. 2960, 3053 (2006); VIOLENCE AGAINST WOMEN AND DEPARTMENT OF JUSTICE REAUTHORIZATION ACT OF 2005 Technical Amendments, *See* Pub. L. 109-271, 120 Stat. 750, 762 (August 12, 2006). Hereinafter these two laws are collectively referred to as VAWA 2005.

<sup>5</sup> VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, Pub. L. 113-4, 127 Stat. 54, 110 (, 2013)..

<sup>6</sup> On June 26, 2013, the U.S. Supreme Court struck down a provision of the Defense of Marriage Act (DOMA) (*United States v. Windsor*, 12-307 WL 3196928). The impact of this decision is that, as a matter of federal law, all marriages performed in the United States will be valid without regard to whether the marriage is between a man and a woman, two men, or two women. Following the Supreme Court decision, federal government agencies, including the U.S. Department of Homeland Security (DHS), have begun the implementation of this ruling as it applies to each federal agency. DHS has begun granting immigration visa petitions filed by same-sex married couples in the same manner as ones filed by heterosexual married couples (<http://www.dhs.gov/topic/implementation-supreme-court-ruling-defense-marriage-act>). As a result of these laws VAWA self-petitioning is now available to same-sex married

victims to include their family members from same-sex marriages (spouses, stepchildren, stepparents) in their U visa applications. This chapter discusses Department of Homeland Security (DHS) procedures and case processing priorities that are extremely important for advocates and attorneys doing safety planning with immigrant crime victims. The suggested evidentiary documents in this chapter are provided as guidelines and are not an exhaustive description of the types of evidence that may be offered to support an immigrant victim's U visa application. This chapter concludes with guidance on how to assist immigrant U visa holders in applying for lawful permanent residency.<sup>7</sup> If a potential U visa applicant is identified, they should be referred promptly to an immigration attorney or advocate who has experience filing U visa cases.<sup>8</sup>

The U visa is a form of immigration relief designed to offer temporary access to legal immigration status for immigrant victims of domestic violence, sexual assault, human trafficking, and a range of other criminal activities. The U visa was created as part of the Violence Against Women Act of 2000 to offer the protection of legal immigration status to a broader range of immigrant domestic violence, sexual assault, and other crime victims. U visas are available for victims of domestic violence who may not qualify for VAWA self-petitioning.

A VAWA self-petition is a form of immigration relief available only when the victim's abuser is a U.S. citizen or a lawful permanent resident spouse, former spouse, parent, stepparent, or over 21-year-old son or daughter. The U visa was developed to provide the protection of immigration benefits to victims of U visa listed criminal activities including when the abuser is a family member who is not a spouse (e.g., a father-in-law, brother), is a boyfriend, is the father of the victim's child, is a spouse who is not a citizen or lawful permanent resident, is an acquaintance, a stranger or any other individual. Victims of domestic violence who qualify for VAWA self-petitioning<sup>9</sup> may also qualify to file for a U visa. The Violence Against Women Act's (VAWA) protections and help for victims, including the immigration protections are open to all survivors<sup>10</sup> without regard to the victim's gender identity. VAWA 2013 expanded the definition of

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couples (this includes protections for all spouses without regard to their gender, gender identity - including transgender individuals – or sexual orientation) including particularly:

- victims of battering or extreme cruelty perpetrated by a U.S. citizen or lawful permanent resident spouse against a same sex partner in the marriage is eligible to file a VAWA self-petition; and
- an immigrant child who is a victim of child abuse perpetrated by their U.S. citizen or lawful permanent resident step-parent is also eligible when the child's immigrant parent is or was married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

<sup>7</sup> The process of applying for lawful permanent residency in the United States is referred to under immigration law as "adjustment of status."

<sup>8</sup> To find attorneys and advocates with expertise working with immigrant victims of violence against women advocates and attorneys should contact the technical assistance resources listed at the end of this chapter. To locate resources a state-by-state listing of programs with expertise offering advocacy, legal services and support for immigrant crime victims, see NIWAP's Directory of Programs with Experience Serving Immigrant Victims, <https://niwaplibrary.wcl.american.edu/home/directory-programs-serving-immigrant-victims>.

<sup>9</sup> For a full discussion of VAWA self-petitioning see Chapter 11 "Preparing the VAWA self-petition and Applying for Residence" in this manual.

<sup>10</sup> In this Manual, the term "victim" has been chosen over the term "survivor" because it is the term used in the criminal justice system and in most civil settings that provide aid and assistance to those who suffer from domestic violence and sexual assault. Because this Manual is a guide for attorneys and advocates who are negotiating in these systems with their clients, using the term "victim" allows for easier and consistent language during justice system interactions. Although men, women, and people who do not identify as either men or women can all be victims of domestic violence and sexual assault, in the overwhelming majority of cases the perpetrator identifies as a man and

underserved populations to include sexual orientation and gender identity and added non-discrimination protections that bar discrimination based on sex, sexual orientation and gender identity.<sup>11</sup> Some victims of sexual assault and other crimes may not qualify for VAWA self-petitioning relief because the sexual assault assailant is an employer, co-worker, teacher, acquaintance, or stranger. Many sexual assault perpetrators are acquainted to the victim through family, school, work, university or the abusers attempt to have a dating relationship with the victim. Thus, it is important to reiterate that the U visa can help several groups of victims of violence, including victims of sexual assault and battered immigrants who were not covered by the original VAWA self-petition or cancellation of removal provisions. Immigrants who are abused by a boyfriend or another person who is not a spouse or parent, or by a spouse or parent who is not a U.S. citizen or permanent resident can obtain U visas. The U visa also offers protections for the children of immigrant victims. VAWA allows children included in their parents' U visa application to receive U visas regardless of whether they turn 21 during the petition's review.<sup>12</sup> In other words, children included in a U visa victim's application are protected from "aging out" at age 21.<sup>13</sup> The U visa also helps non-citizen victims of other criminal activities, including victims of rape or sexual assault who may not know or be related to the perpetrator and domestic workers who are abused or held hostage in the home by their employers.

Qualifying to be granted a U visa is in some ways more difficult than self-petitioning under VAWA. An immigrant victim applying for a U visa must report to law enforcement, prosecutors, judges, child or adult protective services, labor enforcement agencies, or government officials, must suffer substantial physical or emotional abuse, and must provide helpfulness in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity to law enforcement, prosecutors, judges, or other government agencies with investigative powers in order to qualify.<sup>14</sup> If an immigrant victim has never called the police, never sought help from or participated in a civil, family, or criminal court proceeding, never reported the criminal activity to a government official (*e.g.*, child protection or the EEOC<sup>15</sup>), or never filed a police report and is afraid or unwilling to do so, it will not be possible to apply for a U visa. Victims who do not file a police report prior to seeking help as a crime victim can be assisted by victim advocates in making a police report, even if the incident occurred in the past. Victims may still be eligible for a U visa even if they file a timely or later after the incident report, but the local police decide not to pursue an investigation of the criminal activity reported.

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the victim identifies as a woman. Therefore we use "he" in this Manual to refer to the perpetrator and "she" is used to refer to the victim.

<sup>11</sup> VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, Pub. L. 113-4, 127 Stat. 54, 110 (2013). (The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived" gender-related characteristics. ); 42 U.S.C. § 13925(b)(13).

<sup>12</sup> "Aging out" was a process that barred the eligibility of children who turned 21 while their petition was being considered. However, VAWA § 805(a) and INA § 214(p) 8 U.S.C. 1184(p)(7)(A) have amended this position.

<sup>13</sup> VAWA § 805(a) and INA § 214(p) 8 U.S.C. 1184(p)(7)(A).

<sup>14</sup> Although law enforcement officials are capable of certifying qualifying criminal activity, other government agencies with investigatory powers are also able to certify. Victims may choose to pursue action against a perpetrator without involving local law enforcement, such as child and elder abuse agencies or family court judge or judicial official.

<sup>15</sup> The EEOC is responsible for protecting workers against employment discrimination based on race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, disability, age (40 or older), or genetic information.

## The Violence Against Women Act of 2000

The Violence Against Women Act of 2000 (“VAWA 2000”)<sup>16</sup> created the U visa for immigrant victims of criminal activity. The U visa offers temporary lawful immigration status to victims of certain criminal activity if the victim has suffered substantial physical or mental abuse as a result of the criminal activity.<sup>17</sup> The victim must have information about the criminal activity and a law enforcement official (*e.g.*, police, prosecutor, state police, FBI), a judge or other qualifying government official (*e.g.*, adult/child protection, EEOC, labor enforcement) must certify that the victim has been helpful, is being helpful, or is likely to be helpful in detecting, investigating, prosecuting, convicting or sentencing, the criminal activity.<sup>18</sup> Congress’ legislative findings describe why U visa immigration relief was created:<sup>19</sup>

“[C]reate a new nonimmigrant visa<sup>20</sup> classification that will strengthen the ability of law enforcement agencies to detect, investigate and prosecute cases of domestic violence, sexual assault, trafficking and other crimes ... committed against aliens,<sup>21</sup> 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....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 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.”

This form of immigration relief gives the applicant temporary legal immigration status and the possibility of lawful permanent residence. The maximum number of U visas available in any one year is 10,000 for the crime victim applicants. Spouses and children of U visas applicants may also qualify for a U visa and under 21-year-old U visa applicants may also include in their U visa applications, their parents and any of their siblings who are unmarried and under the age of 18 on the date the U visa application is filed.<sup>22</sup> There is no limit on the number of U visas available for qualifying relatives.<sup>23</sup>

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<sup>16</sup> VIOLENCE AGAINST WOMEN ACT of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

<sup>17</sup> INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

<sup>18</sup> INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

<sup>19</sup> VIOLENCE AGAINST WOMEN ACT of 2000 Section 1513(a), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. No. 106-939, 73 (2000) (Conf. Rep.).

<sup>20</sup> “Non-immigrant” visas are issued to persons granted permission to remain temporarily (not permanently) in the United States. If an immigrant is granted permission to live permanently in the United States, they will receive an “immigrant” visa.

<sup>21</sup> The Immigration and Nationality Act defines the term ‘alien’ as any person who is not a citizen or national of the United States. Practically speaking, this term covers a broad group of people including but not limited to permanent residents, refugees, asylees, people granted other forms of legal immigration visas, people who enter with visas and then overstay, and people who enter the U.S. without inspection.

<sup>22</sup> For more information on U visa protections for family members and age-out protections, *see* Sylvie Sheng and Leslye E. Orloff, *U visa Protections for Family Members*, (July 3, 2020)<https://niwaplibrary.wcl.american.edu/pubs/u-visa-family-member>.

<sup>23</sup> INA § 214(o)(3); 8 U.S.C. § 1184(o)(3).

U visa applicants may include their family members in their U visa application. This provides U visas for family members allowing them to remain together in the United States rather than being separated while the crime victim participates in the criminal investigation process. U visa applicants may also obtain U visas for family members living abroad. Beyond family reunification, U visas for family members can be extremely helpful in providing emotional and financial support for the U visa victim. Family members can assist the victim with childcare and other issues. U visa protections for family members may also be an urgent safety precaution as it protects the victim's family members from threats and retaliation in their home country if the victim cooperates with law enforcement officials in the United States.

### **U Visa Implementation by the U.S. Department of Homeland Security (DHS): Bona Fide Determinations and Adjudication**

U visa adjudications are centralized with a specially trained team of adjudicators that adjudicate all VAWA, T visa, and U visa cases.<sup>24</sup> In March of 2023, adjudications of bona fide determinations in U visa cases and VAWA self-petitions were moved to the HART<sup>25</sup> Service Center at U.S. Citizenship and Immigration Services. The U visa full adjudications of U visa cases will continue for now as of this writing to be conducted by the Violence Against Women Act (VAWA) units of the Vermont and Nebraska Service Centers.<sup>26</sup> The legislative history of the Violence Against Women Act of 2005 describes the importance of having specially trained officers adjudicating crime victims' immigration cases at HART and the Victims and Trafficking Unit as follows:

“In 1997, the Immigration and Naturalization Service consolidated adjudication of VAWA self-petitions and VAWA-related cases in one specially trained unit that adjudicates all VAWA immigration cases nationally. The unit was created ‘to ensure sensitive and expeditious processing of the petitions filed by this class of at-risk applicants . . .’ to ‘[engender] uniformity in the adjudication of all applications of this type’ and to ‘[enhance] the Service’s ability to be more responsive to inquiries from applicants, their representatives, and benefit granting agencies.’ . . . T visa and U visa adjudications were also consolidated in the specially trained Victims and Trafficking Unit.”<sup>27</sup>

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<sup>24</sup> Memorandum from William R. Yates, Assoc. Dir. Operations, Dep’t of Homeland Sec. to Dir. Vermont Serv. Ctr. re: Centralization of Interim Relief for U Nonimmigrant Status Applicants, 2 (Oct. 8, 2003), <http://www.uscis.gov/files/pressrelease/UCntrl100803.pdf>. Forms of temporary status include deferred action, parole and stays of removal.

<sup>25</sup> On March 30, 2023, USCIS announced the opening of the Humanitarian, Adjustment, Removing Conditions, and Travel Documents (HART) Service Center. For more information on the HART Service Center. For more information see <https://www.uscis.gov/outreach/upcoming-national-engagements/overview-of-the-new-humanitarian-adjustment-removing-conditions-and-travel-documents-hart-service>.

<sup>26</sup> See USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION C - ADJUDICATIVE PROCESS [3 USCIS-PM C.5(C)] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

<sup>27</sup> H.R. REP. NO. 109-233, 116 (2005).

All U visa applications should be filed with the Victims and Trafficking Unit at the DHS Vermont or Nebraska Service Centers.<sup>28</sup> Applications filed by victims outside of the United States must also be filed with the Victims and Trafficking Unit at the Vermont or Nebraska Service Center following the same process as all other U visa applicants.<sup>29</sup> Once an application is filed the first step in the adjudication process is that the case will be sent to the HART Service Center for review and a bona fide determination.<sup>30</sup> U visa applicants granted bona fide determinations will be granted employment authorization and deferred action which provides the victim protection from deportation.<sup>31</sup>

It is important to note that DHS does not require filing fees for the filing of U visa cases. There are, however, some types of forms that require fees that must be filed as part of some victims' U visa applications. Examples include: inadmissibility waivers (I-192) and waivers of passport or visa requirements (I-193) in U visa cases.<sup>32</sup> By statute U visa victims must be afforded access to fee waivers for all DHS filing fees and costs related to any part of the victim's U visa case from filing through receipt of lawful permanent residency.<sup>33</sup> Thus fee waivers are available for U visa applicants and U visa holders for all fees associated with inadmissibility and passport waivers, work authorization,<sup>34</sup> and filing for lawful permanent residency as a U visa holder (form I-485<sup>35</sup>, form I-765<sup>36</sup>, biometrics<sup>37</sup>, and I-601<sup>38</sup>).

Although the U visa was created in 2000, the DHS regulations implementing U visa protections were not published until September 17, 2007. The regulations went into effect October 17, 2007. During the period between 2000 and 2007, Department of Homeland Security ("DHS") created a temporary application process called interim relief<sup>39</sup> that gave U visa eligible

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<sup>28</sup> 8 C.F.R. § 214.14(c)(1) (2008). *See also* Corrin Chow and Rocio Molina, *USCIS Announces New filing Location* (Sept. 21, 2020) <https://niwaplibrary.wcl.american.edu/pubs/u-visa-filing-vsc-nsc>; Corrin Chow and Rocio Molina, *Map of New USCIS Filing Locations for U visa and Lawful Permanent Residency Forms* (July 24, 2020) <https://niwaplibrary.wcl.american.edu/pubs/map-of-dhs-new-uscis-filing-locations>.

<sup>29</sup> Corrin Chow and Rocio Molina, *Map of New USCIS Filing Locations for U visa and Lawful Permanent Residency Forms* (July 24, 2020, <https://niwaplibrary.wcl.american.edu/pubs/map-of-dhs-new-uscis-filing-locations>).

<sup>30</sup> USCIS, *Overview of the New Humanitarian, Adjustment, Removing Conditions and Travel Documents (HART) Service Center* (Apr. 20, 2023) <https://www.uscis.gov/outreach/upcoming-national-engagements/overview-of-the-new-humanitarian-adjustment-removing-conditions-and-travel-documents-hart-service>. *See also* USCIS, *USCIS Opens the Humanitarian, Adjustment, Removing Conditions and Travel Documents (HART) Service Center* (2023) [https://www.uscis.gov/sites/default/files/document/notices/USCISOpenstheHumanitarianAdjustmentRemovin\\_gConditionsandTravelDocumentsHARTServiceCenter.pdf](https://www.uscis.gov/sites/default/files/document/notices/USCISOpenstheHumanitarianAdjustmentRemovin_gConditionsandTravelDocumentsHARTServiceCenter.pdf).

<sup>31</sup> 3 USCIS-PM C.5..

<sup>32</sup> 8 C.F.R. § 103.7(c) (2008).

<sup>33</sup> WILLIAM WILBERFORCE TRAFFICKING VICTIMS PROTECTION ACT, § 201(d) Pub. L. 110-457 (2008); INA §245(l)(7).

<sup>34</sup> INA §245(l)(7).

<sup>35</sup> 8 C.F.R. § 103.7(c)(5)(ii) (2008) (Adjustment of Status).

<sup>36</sup> 8 C.F.R. § 103.7(c)(5)(i) (2008) (Application for Employment Authorization).

<sup>37</sup> 8 C.F.R. § 103.7(c)(5)(i) (2008).

<sup>38</sup> 8 C.F.R. § 103.7(c)(5)(ii) (2008) (Form I-601 Application for Waiver of Inadmissibility Grounds).

<sup>39</sup> The temporary application process granting interim relief between 2000 and 2007 is distinct and separate from the Bona Fide Determination Process announced on June 14, 2021. *Compare* Michael D. Cronin, Acting Executive Assoc. Comm'r, Office of Programs, INS to Michael A. Pearson re: VTPVA Policy (Aug. 30, 2001), <https://niwaplibrary.wcl.american.edu/pubs/imm-gov-dojmemocronindeferredaction-09-09-00>; NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53015-16 (Sept. 17, 2007) ; and USCIS Policy Alert (PA-2021-13), Bona Fide Determination Process

immigrants access to legal work authorization and protection from deportation (*deferred action*).<sup>40</sup> On October 18, 2007 DHS stopped providing interim relief and began processing U visas.<sup>41</sup>

Due in large part to the statutory cap of 10,000 U visas per year, the backlog of cases that had not been adjudicated led to significant delays in U visa victims' ability to obtain access to work authorization and protection from deportation.<sup>42</sup> Between October 18, 2007 and June 14, 2021, U visa eligible immigrants were required to wait until complete adjudication of their U visa application before being eligible for work authorization and protection from deportation.<sup>43</sup> These delays jeopardized the safety of immigrant victims and their children, impeded victims' ability to leave abusive homes and work places, and undermined both the crime fighting and victim protection purposes of the U visa program.<sup>44</sup>

U visa applicants have limited access to federal and state public benefits.<sup>45</sup> Making early access to legal work authorization particularly crucial to helping immigrant victims provide for themselves and their children and enhances victim safety by severing economic dependence on an abusive family member or employer.

On June 14, 2021, USCIS exercised its discretion to reform U visa adjudication procedures establishing a new Bona Fide Determination (BFD) process.<sup>46</sup> The goal of the bona fide determination (BFD) process is to alleviate harm to victims, law enforcement, and prosecutors, caused by the U visa cap and the resulting U visa adjudication backlog by giving U

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for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners (June 14, 2021),

<https://niwaplibrary.wcl.american.edu/pubs/u-visa-bona-fide>.

<sup>40</sup> See generally Memorandum from Michael D. Cronin, Acting Executive Assoc. Comm'r, Office of Programs, INS to Michael A. Pearson re: VTPVA Policy (Aug. 30, 2001) <https://niwaplibrary.wcl.american.edu/pubs/imm-gov-dojmemocronindeferredaction-09-09-00>.

<sup>41</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53021 (Sept. 17, 2007).

<sup>42</sup> Leslye E. Orloff, Urgent Reforms Needed in the U Visa Program, in *Redefining Immigration: How Immigration Supports American Ideals* (Niskanen Center ed., 2020), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-reforms-needed>.

<sup>43</sup> See, NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53028 (Sept. 17, 2007); 8 CFR § 214.14(d)(2); USCIS Policy Alert (PA-2021-13), Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners (June 14, 2021),

<https://niwaplibrary.wcl.american.edu/pubs/u-visa-bona-fide>; and Michael D. Cronin, Acting Executive Assoc. Comm'r, Office of Programs, INS to Michael A. Pearson re: VTPVA Policy (Aug. 30, 2001), <https://niwaplibrary.wcl.american.edu/pubs/imm-gov-dojmemocronindeferredaction-09-09-00>

<sup>44</sup> Leslye E. Orloff et al., *Transforming Lives: How the VAWA Self-petition and U Visa Change the Lives of Survivors and their Children After Employment Authorization and Legal Immigration Status* (June 8, 2021) <https://niwaplibrary.wcl.american.edu/transforming-lives-study-21>.

<sup>45</sup> Access to public benefits varies by state, by benefits program, and by immigration status. To look up what state or federal public benefits an immigrant victim qualifies to receive go to: <https://niwaplibrary.wcl.american.edu/allstate-public-benefits-charts>.

<sup>46</sup> 3 USCIS-PM C.5(C). See INA 214(p)(6) ("The Secretary may grant work authorization to any alien who has a pending, bona fide application for nonimmigrant status under section 101(a)(15)(U)."), <https://niwaplibrary.wcl.american.edu/pubs/uscis-press-release-u-bona-fide>.

visa applicants with bona fide cases earlier access to the lifesaving protections that come from work authorization and deferred action for themselves and their qualifying family members.<sup>47</sup>

Bona fide generally means “made in good faith; without fraud or deceit.”<sup>48</sup> In deciding whether to issue a BFD for a U visa applicant, USCIS reviews the application and conducts background checks. Victims granted Bona Fide Determinations receive employment authorization and deferred action which will be valid for 4 years.<sup>49</sup> It is best practice for U visa applicants to file their I-765 work authorization application together with their U visa application. Filing the I-765 and the U visa application together ensures that the application is already on file and the victim can be granted work authorization when they are granted deferred action either as part of a bona fide determination<sup>50</sup> or being placed on the waiting list.<sup>51</sup>

All Form I-765 work authorization requests filed concurrently with their U visa applicants seeking work authorization based on the U visa under 8 CFR 274a.12(a)(19), will be converted automatically to applications for work authorization based on deferred action 8 CFR 274a.12(c)(14) when the U visa applicant is granted deferred action following either a bona fide determination or waitlist approval.<sup>52</sup> Applicants for work authorization based on deferred action are required to submit a fee to have their work authorization processed or must submit a fee waiver using Form I-912.

U visa applicants granted BFDs will need to file to renew their BFD based work authorization and deferred action every four years while the victim awaits the availability of a U visa.<sup>53</sup> Work authorization renewal requests will require submission of a new I-765 together with the required fee or a fee waiver request (Form I-192)<sup>54</sup>

Immigrant victims may be granted U visa bona fide determinations and U visas despite the victim having a criminal history, particularly when the crime is connected to the abuse. However, in order for immigrant victims with criminal histories to have the best likelihood USCIS granting such victims a bona fide determination with earlier access to work authorization

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<sup>47</sup> USCIS Policy Alert (PA-2021-13), Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners (June 14, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-bona-fide>.

<sup>48</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, [3 USCIS-PM C.5] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

<sup>49</sup> 3 USCIS-PM C.5.

<sup>50</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION A – BONE FIDE DETERMINATION, SUBSECTION 2 – QUALIFYING FAMILY MEMBERS [3 USCIS-PM C.5 (A)(2)] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

<sup>51</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 6 – WAITING LIST, SECTION B – ADJUDICATION OF WAITING LIST ELIGIBILITY [3 USCIS-PM C.6(B)] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6>. (U visa applicants and qualifying family members placed on the waiting list, receive employment authorization valid for a period of 4 years, similar to petitioners who receive a BFD EAD).

<sup>52</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION 3 – ADJUDICATIVE PROCESS, SUBSECTION 2 QUALIFYING FAMILY MEMBERS.[3 USCIS-PM C.5 (C)(2).

<sup>53</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION C – ADJUDICATIVE PROCESS, SUBSECTION 6 - REQUEST TO RENEW BONA FIDE DETERMINATION EMPLOYMENT AUTHORIZATION DOCUMENT AND DEFERRED ACTION [3 USCIS-PM C.5 (C)(6)].

<sup>54</sup> 3 USCIS-PM C.5 (C)(6).



and deferred action, it is important for counsel and advocates to work closely with U visa applicants and qualifying family members so as to identify, review, and address in victims initial U visa filing all potential red flags<sup>55</sup> and inadmissibility bars.<sup>56</sup> If there is a history of arrests but no chargers or convictions, it is best practice to work with the victim to directly address and fully explain these incidents. USCIS may use its discretion to grant a bona fide determination to who it determines merit a favorable exercise of discretion, considering any risk to national security or public safety.<sup>57</sup>

However, arrests or police detentions that are not adequately addressed and explained may be considered adverse discretionary factors that could negatively<sup>58</sup> impact the applicant by triggering USCIS general discretionary powers<sup>59</sup> and could lead to USCIS deciding not to provide a bona fide determination to the applicant. Qualifying family members are only considered for bona fide determinations after the primary applicant is granted a bona fide determination.<sup>60</sup> As a result, if concerns about criminal or inadmissibility histories result in a USCIS decision not to grant a bona fide determination to the U visa applicant victim, their family members will not be considered for bona fide determinations.

If a victim is not granted a bona fide determination, the applicant and qualifying family members<sup>61</sup> will receive and will need respond to a request for further evidence (RFE) to address deficiencies in the application.<sup>62</sup> If USCIS receives a response to the RFE that is sufficient for the case to proceed to waitlist adjudication, USCIS will place the case in line for wait list adjudication.<sup>63</sup> The applicant that did not receive a bona fide determination will have to wait until their case can be fully waitlist adjudicated before they are granted deferred action and work authorization.<sup>64</sup> This waitlist adjudication will include a comprehensive review of the available evidence to determine whether the qualifying member to waive any grounds for inadmissibility.<sup>65</sup> Going through the full waitlist adjudication process could take years. It is

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<sup>55</sup> See VAWA Red Flags, NIWAP (July 16, 2015), <https://niwaplibrary.wcl.american.edu/pubs/vawa-red-flags>.

<sup>56</sup> Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases (Dec. 26, 2022), <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>57</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION B – EXERCISE OF DISCRETION, INCLUDING RISK TO NATIONAL SECURITY OR PUBLIC SAFETY AND OTHER FACTORS [3 USCIS-PM C.5(B)] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

<sup>58</sup> 3 USCIS-PM C.5(B).

<sup>59</sup> 3 USCIS-PM C.5(B).

<sup>60</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION A - BONA FIDE DETERMINATION, SUBSECTION 2 - QUALIFYING FAMILY MEMBERS [3 USCIS-PM C.5(A)(2)] (A qualifying family member is not eligible unless the principle petitioner receives a bona fide determination and then USCIS will adjudicate the supplemental materials listed). See also 3 USCIS-PM C.5(C) (If USCIS determined that the U visa applicant does not merit a bona fide determination, then the applicant and their qualifying family members undergo adjudication for waiting list placement).

<sup>61</sup> Access to U visas for victim’s family members is discussed in greater detail later in this chapter.

<sup>62</sup> 3 USCIS-PM C.5(C).

<sup>63</sup> 3 USCIS-PM C.5(C).

<sup>64</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION C - ADJUDICATIVE PROCESS, SUBSECTION 5 - WAITING LIST ADJUDICATION [3 USCIS-PM C.5(C)(5)] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

<sup>65</sup> 3 USCIS-PM C.5(B).

important to note as well that, if USICS does not receive a response to the RFE that is sufficient to move the case forward to waitlist adjudication, USCIS will deny the petition.

There is no appeals process and process through which to request reopening or reconsideration bona fide determination denials.<sup>66</sup> It is therefore extremely important that any immigrant victims with criminal or inadmissibility histories be represented by an attorney with specialized expertise on U visa cases who fully addresses in the victim's initial U visa filing any potentially adverse discretionary factors that could impede the victim's access to work authorization and deferred action through a bona fide determination.

The BFD Process is available only to victims residing in the United States. It does not apply to U visa applicants residing outside of the United States.<sup>67</sup> U visa applicants and qualifying family members living outside of the United States proceed directly to waiting list adjudication.<sup>68</sup> If the U visa applicant and qualifying family members are determined eligible for waiting list placement and are outside of the United States, they are encouraged "to submit [a work authorization form] upon admission to the United States."<sup>69</sup> U visa applicants and qualifying family members, "who are outside the United States, may generally seek parole on a case-by-case basis through processes available to other noncitizens."<sup>70</sup>

### **Pending U Visa Applications and Protections from Deportation: *A Safety Planning Opportunity***

Early screening of immigrant victims of domestic violence and sexual assault for U visa or VAWA self-petitioning eligibility is important because it speeds an immigrant victims' access to both legal work authorization and formal protection from deportation through deferred action. The enhanced victim safety that can be achieved by early identification and filing of U visa applications and VAWA self-petitions is based on VAWA confidentiality statutory protections under 8 U.S.C. Section 1367.<sup>71</sup>

Since VAWA confidentiality became law in 1996, a series of DHS policies have been issued that offered enhanced protection to immigrant victims of crime and abuse.<sup>72</sup> Each of the

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<sup>66</sup> 3 USCIS-PM C.5(C).

<sup>67</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 5 – BONA FIDE DETERMINATION PROCESS, SECTION C - ADJUDICATIVE PROCESS, SUBSECTION 7 - PETITIONERS RESIDING OUTSIDE OF THE UNITED STATES [3 USCIS-PM C.5(C)(7)] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>.

<sup>68</sup> 3 USCIS-PM C.5(C)(7).

<sup>69</sup> 3 USCIS-PM C.5(C)(7).

<sup>70</sup> 3 USCIS-PM C.5(C)(7). There is no clarity about how an applicant outside of the United States can be admitted after they receive waiting list placement. *See also* 3 USCIS-PM C.6(B).

<sup>71</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 6 – WAITING LIST, SECTION B – ADJUDICATION OF WAITING LIST ELIGIBILITY [3 USCIS-PM C.6(B)] (Last updated July 06, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6>. There is no clarity on what parole processes have been or are made available to U visa applicants outside of the United States if they receive waiting list placement.

<sup>72</sup> For more on VAWA confidentiality and its legislative history, *see* Alina Husain, Daliana Gomez Garcia, and Leslye E. Orloff, *VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy* (Feb. 22, 2017, updated June 7, 2022) <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history>.

<sup>73</sup> Michael D. Cronin, Acting Executive Assoc. Comm'r, Office of Programs, INS to Michael A. Pearson re: VTPVA Policy (Aug. 30, 2001), <https://niwaplibrary.wcl.american.edu/pubs/imm-gov->

victim protection policies issued over the years has remained in effect<sup>73</sup> and been expanded upon by subsequent DHS policies. The statutory, regulations, and governing DHS policies include instructing DHS trial attorneys and DHS enforcement officers to exercise prosecutorial discretion:

- To not initiate immigration enforcement actions against immigrant crime victims and witnesses with pending applications for legal immigration status that DHS deems valid;
- To dismiss deportation and removal actions against immigrants who are victims of crime and abuse or who are witnesses, particularly those with pending VAWA confidentiality protected abuse-based immigration cases; and
- To prioritize apprehension and removal of immigrants who are a threat to national security, public safety,<sup>74</sup> or border security.<sup>75</sup>

Immigration enforcement will only occur against immigrants who are enforcement priorities and only after the totality of the facts and circumstances are considered including aggravating and mitigating factors.<sup>76</sup> For example in a case of an immigrant crime victim who entered the United States after November 1, 2020 who would fall within the border security enforcement priority, having suffered domestic violence, child abuse, dating violence, stalking, or sexual assault in the U.S. would be mitigating factors that could lead to an exercise of

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dojmemocronindeferredaction-09-09-00; John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (DHS, U.S. Immigration and Customs Enforcement, Aug. 20, 2010), <https://niwaplibrary.wcl.american.edu/pubs/imm-gov-icememoalienspend10>; Alejandro N. Mayorkas, Guidelines for the Enforcement of Civil Immigration Law, DHS Secretary to Tae D. Johnson re: Civil Immigration Enforcement Priorities (Sept. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/mayorkas-civil-imm-guide-sept-21>; Draft of Standard Operating Procedures Directive Applicable to All ICE, CBP and OPLA Officials who Encounter Victims of Crime or Abuse, VAWA Confidentiality Protected Persons, and/or Victims, Witnesses or Parties in Legal Proceedings (Feb. 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/draft-ice-cbp-sop-noncitizen-victims>; Kerry E. Doyle, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion (DHS, U.S. Immigration and Customs Enforcement, Apr. 3, 2022), <https://niwaplibrary.wcl.american.edu/pubs/opla-imm-enforce-guide-2022>. See generally DHS Enforcement Priorities, Courthouse Enforcement and Sensitive Location Policies and Memoranda Information for State Court Judges (Updated Dec. 27, 2021), <https://niwaplibrary.wcl.american.edu/pubs/dhsenforcementpriorities-benchmark>.

<sup>73</sup> Email from Lauren Villagran, Searchlight New Mexico, to I.C.E Media (Apr. 19, 2019) (on file with NIWAP at <https://niwaplibrary.wcl.american.edu/pubs/ice-memo-april-2019-memo-on-crime-victims>) (This email confirms the that the 2011 ICE Victim Witness memo continues to be the ICE 2019 policy in place regarding immigrant crime victims and it confirms that the 2009 policies regarding expedited adjudication of pending U visa applications when a victim is in ICE detention also continues to be the ICE policy in 2019).

<sup>74</sup> A noncitizen poses a current threat to public safety, typically because of serious criminal conduct. Whether a noncitizen poses a current threat to public safety requires an assessment of the individual and the totality of the facts and circumstances. Memorandum from Alejandro N. Mayorkas, Sec’y, U.S. Dep’t of U.S. Sec., *Guidelines for the Enforcement of Civil Immigration Law*, 3 (Sept. 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/civil-immigration-enforcement-guidelines-9-2021>.

<sup>75</sup> A noncitizen apprehended at the border or port of entry while attempting to unlawfully enter the United States; or a noncitizen apprehended in the United States after unlawfully entering after November 1, 2020. It is important to note that in cases concerning border security, there could be mitigating or extenuating facts and circumstances that militate in favor of declining enforcement action. This includes the immigrant having suffered crime victimization or abuse which will be considered.

See Alejandro N. Mayorkas, Sec’y, U.S. Dep’t of U.S. Sec., *Guidelines for the Enforcement of Civil Immigration Law*, 3-4 (Sept. 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/civil-immigration-enforcement-guidelines-9-2021>.

discretion not to enforce immigration laws against the victim. The ability of an immigrant victim to receive this exercise of discretion is strongest when the victim has a pending VAWA confidentiality protected case (e.g., U visa, VAWA self-petition, T visa). It is best practices for advocates and attorneys provide letters to immigrant clients that state that the client is in the process of preparing to a file VAWA, U or T visa case and is protected by 8 U.S.C. 1367. Immigrant clients should be instructed that should they be contacted immigration enforcement officials to provide them the letter which should help stave off immigration enforcement against the victim.<sup>77</sup>

Once a U visa applicant files their immigration case and receives a bona fide determination the victim is granted *deferred action*<sup>78</sup> which provides them formal protection from deportation that augments the VAWA confidentiality protections. It is extremely important from a victim safety planning perspective, to identify and screen immigrant victims of domestic violence, sexual assault, child abuse and other U visa listed criminal activities and their children for U visa, VAWA self-petitioning, and Special Immigrant Juvenile Status eligibility as early as possible in order provide them swifter access to protections from deportation.

The U visa is limited in duration to 4 years with the option to renew under certain circumstances,<sup>79</sup> but it was not intended to offer permanent legal immigration status. Congress created a separate provision through which U visa holders<sup>80</sup> may qualify for lawful permanent residency (a green card), allowing an immigrant victim to remain permanently in the United States.<sup>81</sup>

Advocates and attorneys working with immigrant victims are strongly urged to help eligible victims file for U visa or other VAWA related immigration relief<sup>82</sup> before pursuing other legal protections that could trigger an abuser or crime perpetrator reporting the victim to DHS enforcement officials. Although U visa applicants can simultaneously file applications for

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<sup>77</sup> NIWAP provides technical assistance to support advocates, attorneys and other professionals in the field whose immigrant clients become the subject of immigration enforcement on the VAWA confidentiality protections. Call (202) 274-4457 or [info@niwap.org](mailto:info@niwap.org).

<sup>78</sup> 8 C.F.R. § 214.14(c)(7) (2008).

<sup>79</sup> TVPRA 2008, section 201(c) allows DHS to extend the U visa and employment authorization for U victims beyond four years when either 1) there has been a delay in issuance of adjustment regulations or 2) an adjustment of status application is pending. As of January 16, 2009, there are no rules implemented or pending for these statutory provisions.

<sup>80</sup> In order to be eligible for lawful permanent residence, a U visa holder must prove that they were lawfully admitted to the U.S. as a U 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 continued to cooperate in an investigation of the criminal activity upon which the U visa was granted, and that their presence is justified “on humanitarian grounds, to ensure family unity, or is in the public interest.” INA § 245(m); 8 U.S.C. § 1255(m). 8 C.F.R. §§ 245.23, 245.24 (2008).

<sup>81</sup> Immigrant crime victim eligibility for lawful permanent residency will be discussed fully in a later section of this chapter.

<sup>82</sup> See Introduction to Immigration Relief Chapter of this manual for an overview of the range of immigration relief available to help immigrant victims as well as the individual chapters of this manual devoted to specific forms of immigration benefits including the VAWA self-petition, the Battered Spouse Waiver, the T-Visa and VAWA Cancellation of Removal.

other forms of immigration relief,<sup>83</sup> DHS will only grant the applicant one form of immigration relief. The application that is granted first is the form of immigration relief that the immigrant victim applicant will receive, and all other pending applications will be denied.<sup>84</sup>

Once a case is pending with DHS, retaliatory steps the perpetrator may take to have the victim deported will be less effective. This approach also informs DHS that an immigrant is a crime victim eligible for VAWA confidentiality protections.<sup>85</sup> VAWA confidentiality was designed to stop DHS enforcement officials and DHS trial attorneys from relying on or seeking perpetrator provided information to harm an immigrant victim. By filing a VAWA confidentiality protected immigration case, DHS is provided information that the immigrant is a victim. DHS also receives information regarding the identity of the victim's perpetrator. This strengthens the probability VAWA confidentiality protections will be more effective in the victim's case.

A final reason early filing cases for eligible victims is important has to do with how some DHS officials view U visa and VAWA cases filed after a DHS enforcement action has been initiated. In some cases, DHS enforcement officials have been suspicious about the validity of U visa and VAWA cases filed after DHS has begun an enforcement action against an immigrant. Once the case is filed, not only are many DHS enforcement officials more willing to believe that the victim is credible, but DHS officers who attempt to take enforcement actions against victims can be held accountable for violation of VAWA confidentiality statutes.

## **Applying For a U visa**

### **Who is Eligible to Apply for the Nonimmigrant U visa?**

In order to be eligible for a U visa, the immigrant victim must:

1. Have suffered substantial physical or mental abuse as a result of having been a victim of the one or more of the criminal activities listed under INA § 101(a)(15)(U)(iii);<sup>86</sup>
2. Possess information concerning the criminal activity;<sup>87</sup>

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<sup>83</sup> 214(p)(5), 8 U.S.C.1184(p)(5).

<sup>84</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS, 72 Fed. Reg. 53,023 (Sept. 17, 2007).

<sup>85</sup> Federal VAWA confidentiality laws generally prohibit immigration enforcement actions from occurring against immigrant victims of domestic violence, sexual assault, human trafficking and other U visa covered criminal activities at courthouses, shelters, rape crisis centers, and other statutorily prohibited locations courthouses. VAWA Confidentiality Protections for Immigrant Crime Victims (Update Mar. 8, 2021)<https://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools>.

<sup>86</sup> INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I). See VAWA §1222 and INA § 101(a)(15)(U)(iii) of 8 U.S.C. 1101 (a)(15)(U)(iii) these provisions add "fraud in foreign labor contracting," as defined by 18 U.S.C. 1351, to the list of qualifying crimes for which immigrant victims may be eligible to apply for a U visa under the Immigration National Act. See also VAWA § 801 and INA § 101(a)(15)(U)(iii) 8 U.S.C. 1101(a)(15)(U)(iii) which Amends U visa definition by adding "stalking" to the list of qualifying crimes, included after "sexual exploitation."

<sup>87</sup> INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

3. Obtain a certification from a law enforcement official, prosecutor, judge, child or adult protective services, the EEOC, a state or federal department of labor, an immigration official, or other federal, state, or local authority that the victim is being, has been, or is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of the perpetrator of one or more listed criminal activities;
4. The criminal activity occurred in the United States or violated U.S. laws.<sup>88</sup>

## Who is a “Victim” Eligible to Apply for a U visa?

### Direct Victims

The regulations incorporate a broad framework for how a victim can satisfy the requirement that they have been a victim of an enumerated criminal activity. In order to establish eligibility, the rule generally requires an applicant to show that they were *directly and proximately*<sup>89</sup> harmed by qualifying criminal activity. Both undocumented victims and victims with temporary forms of legal immigration status<sup>90</sup> are eligible to apply for U visas. Petitioners who have another form of temporary legal immigration status may apply for and change their status to a U visa which is a form of immigration relief that provides a path to lawful permanent residence.<sup>91</sup>

- Victims of Perjury, Obstruction of Justice, Witness Tampering: An immigrant who is who is directly or proximately harmed by the perpetrator of witness tampering, perjury, or obstruction of justice; and where there are reasonable grounds to conclude that the perpetrator committed the offense in an effort to frustrate, undermine, or avoid a criminal investigation, arrest, or prosecution; and when the perpetrator uses the legal system to exploit, manipulate or control the victim is an immigrant victim of witness tampering, perjury, or obstruction of justice<sup>92</sup>

### Indirect Victims

DHS sets out several instances under which indirect victims may establish U visa eligibility.<sup>93</sup> Indirect victims filing their own U visa application must meet all of the same eligibility requirements as any other U visa victim including substantial harm and helpfulness.<sup>94</sup> The categories of indirect victims authorized to apply for U visas are:

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<sup>88</sup> INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

<sup>89</sup> A victim is proximately harmed by a criminal activity if the harm would not have occurred had the criminal activity not been perpetrated.

<sup>90</sup> Examples include Deferred Action for Childhood Arrival recipients, student and work visa holders, diplomatic visa holders, tourists and other immigrants on temporary immigration visas.

<sup>91</sup> INA § 248(b).

<sup>92</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53,017. (Sept. 17, 2007).

<sup>93</sup> 8 C.F.R. § 214.14(a)(14) (2008).

<sup>94</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53016–17 (Sept. 17, 2007); 8 CFR § 214.14(a)(14)(i)(2008).

- Victim is deceased: In a murder or manslaughter case the actual victim is deceased. In these cases, DHS regulations allow the spouse and under 21-year-old children of the deceased victim to file a U visa petition on their own behalf as indirect victims. If the deceased victim was under 21 years of age their parents and under 18-year-old siblings could be indirect victims.<sup>95</sup>
- Victim is incompetent, incapacitated or under age 21: In a case in which the direct victim of criminal activity is incompetent, incapacitated, or under age 21 at the time of the criminal activity DHS regulations and policies allow the spouse and under 21-year-old children of the direct victim to file a U visa as an indirect victim.<sup>96</sup> When the direct victim is under the age of 21, indirect victims may be their parent and/or their parents or their unmarried siblings under the age of 18.<sup>97</sup>
- Bystanders: Under limited circumstances bystanders may qualify as U visa victims. When a bystander has suffered an unusually direct injury as the result of a qualifying crime (*i.e.*, suffering a miscarriage after witnessing a criminal activity), the bystander may be eligible for a U visa. DHS will exercise its discretion to grant U visas to bystanders on a case-by-case basis.<sup>98</sup>

DHS explains that:

“Family members of murder, manslaughter, incompetent, or incapacitated victims frequently have valuable information regarding the criminal activity that would not otherwise be available to law enforcement officials because the direct victim is deceased, incapacitated, or incompetent. By extending the victim definition to include certain family members of deceased, incapacitated, or incompetent victims, the rule encourages these family members to fully participate in the investigation or prosecution.”<sup>99</sup>

It is important to note that family members included in the list of indirect victims may apply for U visa immigration relief in their own right. They are not however required to do so.<sup>100</sup> If a mother and her two teenage, under 21-year-old children all qualify to file for U visas as indirect victims, but the mother wants to avoid the trauma of one or more of her children having to cooperate with law enforcement or prosecution officials to that same extent as would be required if the child filed their own U visa application, the mother can file as an indirect

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<sup>95</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53017 (Sept. 17, 2007); 8 C.F.R. § 214.14(a)(14)(i) (2008).

<sup>96</sup> USCIS, Adjudicator’s Field Manual, 4, § 14(i), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm39-external.pdf>.

<sup>97</sup> 8 C.F.R. § 214.14(a)(14)(i) (2008). *See also* USCIS, Adjudicator’s Field Manual, 4, § 14(i), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm39-external.pdf>.

<sup>98</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53016–17 (Sept. 17, 2007).

<sup>99</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53017 (Sept. 17, 2007).

<sup>100</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53017 (Sept. 17, 2007).

victim and can include her children in her U visa application. This way the mother's children receive U visas through the mother's application and cooperation.

### Victims May Not Be Culpable in the Qualifying Criminal Activity

Victims must also show that they are not culpable of the criminal activity upon which the U visa is based.<sup>101</sup> Some U visa applicants may have criminal convictions.<sup>102</sup> In such cases, the applicant will not be prevented from qualifying as a victim so long as the convictions are unrelated to the qualifying criminal activity that caused the victimization.<sup>103</sup> However, where the victim was a culpable participant in the underlying criminal activity upon which the U visa application is based, they are precluded from establishing U visa victimization. Additionally, a U visa applicant cannot seek U visas for culpable family members.<sup>104</sup>

### **What Constitutes Substantial Physical or Mental Abuse?**

To be eligible for U visa status, an applicant must have suffered substantial physical or mental abuse as a result of being a victim of the criminal activity.<sup>105</sup> Mental abuse is defined as an impairment of emotional or psychological soundness.<sup>106</sup> In determining whether the abuse is *substantial*, DHS will consider:

- The nature of the injury;
- The severity of the perpetrator's conduct;
- The severity of the harm suffered;
- The duration of the infliction of harm;<sup>107</sup>
- Permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.<sup>108</sup>

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<sup>101</sup> 8 C.F.R. § 214.14(a)(14)(iii) (2008).

<sup>102</sup> 8 C.F.R. § 214.14(a)(14)(iii) (2008).

<sup>103</sup> Although unrelated criminal activity by the applicant will not prevent them from qualifying as a victim for U visa purposes, that criminal activity may make them inadmissible to the United States. There are waivers available to U visa applicants for some grounds of inadmissibility. Please see the section later in this chapter discussing inadmissibility and waivers.

<sup>104</sup> 8 C.F.R. § 214.14(a)(14)(iii) (2008).

<sup>105</sup> INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I).

<sup>106</sup> 8 C.F.R. 214.14(a)(8) (2008).

<sup>107</sup> In domestic violence cases it is important to provide evidence of the full range of abuse suffered by the victim including the physical and sexual abuse and also the extreme cruelty and coercive control that cause substantial emotional harm. *See generally*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, *Revised Chapter Four: Families and Children, Model Code on Domestic and Family Violence* (Updated 2022)<https://www.ncjfcj.org/wp-content/uploads/2022/12/Revised-MC-Chapter-Four-March-2023.pdf> (containing a detailed description of coercive controlling behaviors with citations to the social science research documenting coercive control and its impact on victims and their children); *see also* Coercive Control in Families, the Impact on Children and Extreme Cruelty presented by Evan Stark (Oct. 16, 2020), <https://niwaplibrary.wcl.american.edu/coercive-control-extreme-cruelty>. A useful comparative check list for stalking, coercive control, and extreme cruelty is SPARC Judicial Officer Guide: Responding to Stalking, 20-21 (Published July 13, 2022), <https://niwaplibrary.wcl.american.edu/pubs/sparc-judicial-guide-for-stalking>.

<sup>108</sup> 8 C.F.R. § 214.14(b)(1) (2008).



DHS will consider any or all of these factors. No single factor is required, nor does the existence of any single factor automatically establish that the abuse was substantial.<sup>109</sup> It is important to note that a series of actions taken together can cumulatively establish substantial abuse, even where no single act would alone rise to that level.<sup>110</sup> Moreover, DHS has discretion to consider both the aggravation of pre-existing conditions, as well as the severity of the perpetrator’s conduct—even if the actual impact on the victim may have been less than intended by the perpetrator.<sup>111</sup> The severity of the perpetrator’s conduct can in some instances, for example rape or attempted murder, can be sufficient to prove substantial physical abuse.

Under the Violence Against Women Act’s any credible evidence rules, victims are allowed to present any credible evidence to establish that they suffered substantial physical or mental abuse.<sup>112</sup> Advocates and caseworkers can play a critical role in assisting victims in collecting documentation and evidence that supports a DHS finding that the victim suffered substantial physical or mental abuse. Using a trauma informed approach to preparing the victim’s affidavit for their U visa case can help improve the detail victims can be able to provide in their affidavits regarding substantial physical or mental abuse suffered.<sup>113</sup>

### **What Is Required To Satisfy “Possession of Information”?**

U visa applicants must prove that they possess information about the criminal activity.<sup>114</sup> Their knowledge of the criminal activity against them is a critical component of the U visa application. Applicants who were under 16 when the criminal activity occurred and victims who lack capacity or competence do not have to prove that they possess information if a parent, guardian, or next friend possesses that information.<sup>115</sup> The *next friend* is a person who acts in a legal proceeding on behalf of an individual who is under the age of 16 or incompetent or incapacitated.<sup>116</sup>

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<sup>109</sup> 8 C.F.R. § 214.14(b)(1) (2008).

<sup>110</sup> 8 C.F.R. § 214.14(b)(1) (2008).

<sup>111</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53018 (Sept. 17, 2007); 8 CFR § 214.14(b)(1).

<sup>112</sup> 8 C.F.R. § 214.14(c)(4) (2008).

<sup>113</sup> For more trauma-informed webinars and training tools see Trauma Informed – Structured Interview Questionnaires for Immigration Cases (SIQI) (2018), <https://niwaplibrary.wcl.american.edu/pubs/siqi-trauma-informed-tool>; and see Trauma-Informed Help for Immigrant Survivors (Updated Mar. 22, 2023), <https://niwaplibrary.wcl.american.edu/trauma-informed-help-for-immigrant-survivors>.

<sup>114</sup> INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

<sup>115</sup> 8 C.F.R. § 214.14(b)(2) (2008).

<sup>116</sup> 8 C.F.R. § 214.14(a)(7) (2008). The *next friend* is not a party to the legal proceeding or an appointed guardian. See also USCIS, Adjudicator’s Field Manual, 3(7), <https://www.uscis.gov/sites/default/files/document/policy-manual-afm/afm39-external.pdf>.

## What are the Types of Criminal Activity That Lead to U-Visa Eligibility?

Congress established the general categories of criminal activities a U visa eligible victim may have suffered.<sup>117</sup>

### Crimes Covered:

Rape	Kidnapping
Torture	Abduction
Trafficking	Unlawful criminal restraint
Incest	False imprisonment
Domestic violence	Blackmail
Sexual assault	Extortion
Abusive sexual contact	Manslaughter
Prostitution	Murder
Sexual exploitation	Felonious assault
Female genital mutilation	Witness tampering
Being held hostage	Obstruction of justice
Peonage	Perjury
Involuntary servitude	Slave trade
Stalking <sup>118</sup>	Fraud in foreign labor <sup>119</sup>
Hate crimes <sup>120</sup>	Child abuse <sup>121</sup>
Elder abuse <sup>122</sup>	Abuse of adults with disabilities <sup>123</sup>

This enumerated list provides guidelines on the types of federal, state, or local crimes that make immigrant victims eligible for U visa immigration relief. When federal, state or local officials believe that criminal activity occurred and that the victim is a potential U visa applicant,

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<sup>117</sup> INA § 101(a)(15)(U)(3); DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT RESOURCE GUIDE, 4 (2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022>.

<sup>118</sup> See VAWA §801 and INA § 101(a)(15)(U)(iii) 8 U.S.C. 1101(a)(15)(U)(iii). These provisions add “stalking” to the list of U visa qualifying crimes, included after “sexual exploitation.”

<sup>119</sup> See VAWA §1222 and INA §101(a)(15)(U)(iii)of 8 U.S.C. 1101 (a)(15)(U)(iii) these provisions add “fraud in foreign labor contracting,” as defined by 18 U.S.C. 1351, to the list of qualifying crimes for which immigrant victims may be eligible to apply for a U visa under the Immigration National Act. Under 18 U.S.C. §1351

(a) **Work Inside the United States.** — Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment in the United States by means of materially false or fraudulent pretenses, representations or promises regarding that employment shall be fined under this title or imprisoned for not more than 5 years, or both.

(b) **Work Outside the United States.** — Whoever knowingly and with intent to defraud recruits, solicits, or hires a person outside the United States or causes another person to recruit, solicit, or hire a person outside the United States, or attempts to do so, for purposes of employment performed on a United States Government contract performed outside the United States, or on a United States military installation or mission outside the United States or other property or premises outside the United States owned or controlled by the United States Government, by means of materially false or fraudulent pretenses, representations, or promises regarding that employment, shall be fined under this title or imprisoned for not more than 5 years, or both.

<sup>120</sup> DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT RESOURCE GUIDE, 5 (2022)<https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022>.

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

officials should provide victims with certification and referrals to local advocates and attorneys who can assist the victim in filing for U visa immigration protection.<sup>124</sup>

The listed crimes are broadly described in the statute to capture the diversity of state and federal criminal activities that an immigrant victim may suffer that are similar to the listed crimes. The U visa list is not an exclusive list. The statute and DHS regulations provide access to U visa protections for criminal activities that are substantially similar to the listed criminal activities.<sup>125</sup> DHS U visa regulations explain that attempts, conspiracy and solicitation to commit a criminal activity covered by the U visa is sufficient for the victim to U visa eligible.<sup>126</sup> The rule provides that:<sup>127</sup>

“[T]he criminal activity listed is stated in broad terms. The rule’s definition of “any similar activity” takes into account the wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list, while the nature and elements of both criminal activities are comparable.”

On some occasions and for varying reasons a listed criminal activity has occurred but the case that law enforcement is pursuing for prosecution is for a crime that is not contained in the U visa list. This can occur for example, when law enforcement officials are investigating narcotics offenses and they obtain a warrant to search the home of an alleged drug dealer. When they enter the home on a warrant the drug dealer’s girlfriend has a black eye. Upon interviewing her they learn that they have been battered by the drug dealer. Under this scenario, police can sign a U visa certification for the domestic violence victim based on her report of domestic violence, although the drug offense, not the domestic violence, case, will be prosecuted.

The U visa offers protection to victims of “criminal activity” as opposed to “crimes” because the U visa was developed to help federal, state or local government officials in the *detection*, investigation, or prosecution of criminal activity. Congress and DHS agree that U visas are available to help victims who help with crime detection.<sup>128</sup> Assistance with detection

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<sup>124</sup> Leslye E. Orloff et. al., *U visa Certification and T visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors*, NIWAP (Aug. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor>. Over 97% of U visa victims file their applications with the assistance of an attorney or accredited representative. USCIS, *U Visa Demographics*, 6 (Mar. 2020), <https://niwaplibrary.wcl.american.edu/pubs/uscis-u-visa-demographics>. To locate an attorney or victim advocate with expertise serving immigrant survivors in your state go to <https://niwaplibrary.wcl.american.edu/home/directory-programs-serving-immigrant-victims>.

<sup>125</sup> 8 C.F.R. § 214.14(a)(9) (2008); *see also* DHS, *U Visa Law Enforcement Resource Guide*, 5 (Feb. 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022>.

<sup>126</sup> 8 C.F.R. § 214.14(a)(9) (2008).

<sup>127</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS, 72 Fed. Reg. 53018 (Sept. 17, 2007).

<sup>128</sup> VIOLENCE AGAINST WOMEN ACT of 2000, Pub. L. No. 106-386, 114 Stat. 1464 §1513(a)(2)(A) (U visa purpose is to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes...”); NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS, 72 Fed. Reg. 53020 (Sept. 17, 2007) (DHS “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.... such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C.1184(p)(1), which permits judges to sign

of criminal activity may include filing a police report, calling the police for help and talking to police at the crime scene, seeking a protection order based on criminal activities suffered, and providing testimony about criminal activities before a court in a contested divorce, custody, child welfare, employment or other civil or family court matter.

Immigration relief offered through the U visa was structured to ensure that immigrant victims who came forward to report their victimization by criminal activity would be able to obtain the U visa program's protections of legal immigration status without regard to whether there is any criminal justice involvement in the case or how the criminal justice system decides to proceed with the case.

## **What Is Required to Obtain a U visa Certification of Helpfulness?**

### Certification from a Federal, State or Local Government Official is Mandatory

DHS mandates that all U visa applications include a certification from a state, local, or federal agency as part of the crime victim's application. A crime victim's application must include a U visa certification Form I-918 Supplement B signed by a government official.<sup>129</sup> The U visa statute authorizes certifying agencies to sign certifications:<sup>130</sup>

- For victims who cooperated in the past on a case that is now closed or completed (has been helpful); or
- For victims currently or recently providing information that assists government officials in detecting the criminal activity and for victims being helpful with ongoing investigations or prosecutions (is being helpful); or
- For victims who are willing to cooperate should an investigation or prosecution take place in the future (likely to be helpful).

The statute and regulations are clear, there is no time limitation or statute of limitations.<sup>131</sup> Certifications can be signed any time after the criminal activity occurred. Once a victim receives a certification, the victim must file their completed U visa application within 6 months of the date the certification was signed. If the victim is unable to complete evidence collection and filing their U visa application within 6 months, the victim must obtain a new certification.

The certification form requires the law enforcement official, judge, prosecutor, or other state, local, or federal government agency certifier to certify the following:

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certifications on behalf of U nonimmigrant status applications....Judges neither investigate crimes nor prosecute perpetrators.”

Judges may certify U visas because when they issue a ruling in a protection order case, they detect the existence of criminal activity. They may also appropriately certify when they are involved in conviction or sentencing of a perpetrator. 72 Fed. Reg. 53020.

<sup>129</sup> 8 C.F.R. § 214.14(c)(2)(i) (2008).

<sup>130</sup> INA § 214(o), 8 U.S.C. 1184(o).

<sup>131</sup> DEP'T OF HOMELAND SEC., U VISA LAW ENFORCEMENT RESOURCE GUIDE, 8 (2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022>.

- Each criminal activity detected;
- Identify the immigrant applicant as the victim of the qualifying criminal activity;
- That the applicant has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of a criminal activity; and
- List any family members that may be implicated in commission of the crime.

Certifiers are also encouraged to note any injuries observed, detected or in the case of judges contained in their findings.<sup>132</sup> Certifying officials are not required to include information about harm suffered by the victim in the certification. The victim has the burden of proving and USCIS adjudicates substantial physical or mental abuse. However, when a certifier has observations or evidence or made findings about harm to the victim, including that information on the certification form provides helpful evidence of the harm suffered by the U visa applicant victim.

Congress specified a range of federal, state and local governmental agencies that are authorized to sign U visa certification.<sup>133</sup> The goal was that certification could be completed by a number of government officials with the authority to detect, investigate, or prosecute criminal activities or convict or sentence perpetrators.<sup>134</sup> Agencies authorized to certify include traditional criminal justice system law enforcement agencies (*e.g.*, police, prosecutors, sheriffs, state police, FBI). Other federal, state, and local governmental agencies also have investigative jurisdiction over matters that include criminal activities and are included among authorized certifying agencies. Agencies and officials who can sign U visa certifications include but are not limited to:<sup>135</sup>

- ▶ Federal, state, local, and tribal law enforcement agencies (*e.g.*, police, sheriffs, assistant U.S. attorneys, federal marshals, FBI)
- ▶ Federal, state, local, and tribal prosecutors
- ▶ Federal, state, local, and tribal judges
- ▶ Child Protective Services
- ▶ Adult Protective Services
- ▶ Equal Employment Opportunity Commission
- ▶ Federal and state departments of labor
- ▶ Immigration officials
- ▶ Other federal, state, and local investigative agencies (*e.g.*, civil and human rights, housing).

The certification must be signed by the head of the certifying agency or designated supervisors.<sup>136</sup> The DHS regulations anticipate that most agencies will have multiple designated

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<sup>132</sup> Dep't of Homeland Sec., U VISA LAW ENFORCEMENT RESOURCE GUIDE, 7 (Feb. 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022>.

<sup>133</sup> Benish Anver, Leslye E. Orloff, & Gwentyth Szabo, U VISA CERTIFICATIONS, T VISA DECLARATIONS, AND CONTINUED PRESENCE: RANGE OF POTENTIAL CERTIFIERS AT THE LOCAL, STATE, AND FEDERAL GOVERNMENT LEVELS, NIWAP (2021), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-range-of-potential-fcertifiers>.

<sup>134</sup> 8 C.F.R. § 214.14(a)(2) (2008).

<sup>135</sup> 8 C.F.R. § 214.14(a)(2) (2008).

<sup>136</sup> 8 C.F.R. § 214.14(a)(3) (2008).

supervisors.<sup>137</sup> Judges are government officials who are directly statutorily authorized by statute to sign U visa certifications.<sup>138</sup> DHS does not impose the head of agency or supervisor requirement on judges.<sup>139</sup>

Although DHS encourages certifying agencies to develop certification policies and procedures,<sup>140</sup> agencies have the authority under federal law to sign certifications whether or not and before the agency issues any certification policy, procedure, or protocol. Many jurisdictions begin signing certifications and later develop policies and procedures support and notifies the community about the agencies' certification process.

Advocates and attorneys working with immigrant crime victims in jurisdictions that do not have established U visa certification policies and procedures should provide certifying agencies with the tools they need to begin doing U visa certifications.<sup>141</sup> It is important to note that certifying agencies are not required to have U visa protocols in place to begin signing U visa certifications. However, having protocols in place promotes efficiency, consistency, and predictability in the U visa certification process. This benefits both the U visa victim and the certifying agency improving police-immigrant community relations, fostering better community policing and enhancing crime detection, investigation and prosecution needed to promote community safety.<sup>142</sup>

It is important for advocates and attorneys to work with law enforcement, prosecutors, judges and other government agencies (*e.g.*, EEOC, labor or child and adult abuse investigative agencies) to build a better understanding of the role of U visa certifications, how it benefits the certifying agency (*e.g.*, by improving community policing), and help certifying agencies establish procedures and protocols that encourage signing of certifications.

### Helpfulness for Certification Purposes

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<sup>137</sup>NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53023 (Sept. 17, 2007); 8 C.F.R. § 214.14(a)(3) (2008).

<sup>138</sup> 101(a)(15)(U)(i)(III).

<sup>139</sup> See Sylvie Sheng et. al., *U visa Certification and T visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers*, NIWAP (June 17, 2021), <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>.

<sup>140</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53023(Sept. 17, 2007).

<sup>141</sup> See Leslye E. Orloff, *U visa Certification and T visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors*, NIWAP 70-75 (Aug. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor>; and Sylvie Sheng et. al., *U visa Certification and T visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers*, NIWAP (June 17, 2021), <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>.

<sup>142</sup> For sample protocols and toolkits on the U visa used in jurisdictions across the country see *Model: U and T Visa Certification Protocol for State Courts* (Oct. 29, 2020), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-certification-protocol-courts>; Tip Sheet for Courts Developing U visa Certification Protocols (Dec. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/tips-for-courts-u-visa-cert-protocols>; *Model U visa Certification Protocol for Law Enforcement Agencies* (Feb. 2014), <https://niwaplibrary.wcl.american.edu/pubs/model-u-cert-protocol-policy> (an excerpt from Toolkit for Adult Protective Services' (APS) Use of The U-Visa, 73-75 (Feb. 2014), <https://niwaplibrary.wcl.american.edu/pubs/aps-u-visa-toolkit>).

The requirement that an applicant “has been helpful, is being helpful or is likely to be helpful”<sup>143</sup> includes past, present, and future helpfulness. Congress adopted this approach to ensure that certifications were not limited to cases in which criminal investigations or prosecutions were underway or completed. The U visa is available to an individual crime victim who is “helpful, was helpful, or will be helpful”<sup>144</sup> in the detection, investigation, or prosecution of the criminal activity or in the conviction or sentencing of the perpetrator.<sup>145</sup> In the initial assessment of helpfulness for certification, it is important to note that the U visa was designed to help immigrant crime victims willing to be helpful in detection, investigation or prosecution of criminal activity.<sup>146</sup> A law enforcement or government agency with investigative powers may complete a U visa certification as soon as they assess a victim’s helpfulness.

A key congressional goal of the U visa legislation was to encourage victims to come forward and report crimes and to secure their assistance in criminal investigations, government agency investigations, and a range of state court proceedings, not just in successful criminal prosecutions. The choice of the term “criminal activity” reflects an understanding that victims do not control the process of criminal investigations or prosecutions. Criminal domestic violence prosecutions were brought by the state. The victim has little, if any, control over the process, proceedings, or outcome. The move towards a victim centered approach was based on the history and development of protection orders needed to provide domestic violence victims a form of civil legal relief that the *victim* could initiate and make decisions about how to proceed while prioritizing victim safety.<sup>147</sup>

Movement of a case through the criminal justice system is a complex matter. In some cases, an investigation is initiated but stalls when a perpetrator cannot be identified or located. In other cases, a perpetrator is arrested, charged, and tried but a conviction is not obtained. For this reason, victims were granted the opportunity to access U visa protection early in the criminal justice process and also when victims participate in civil and family court cases and investigations being conducted by federal and state government agencies (*e.g.*, labor, child and adult protective services, housing).

Eligibility is not contingent upon a case going to trial or upon obtaining a conviction. Involvement in the justice system and in government agency investigations will vary from case to case. When a criminal investigation or prosecution is undertaken, the criminal justice process in each case will be different, and different levels of assistance may or may not be requested from each particular victim. For instance, in one case a victim’s testimony at trial might be

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<sup>143</sup> INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

<sup>144</sup> There is no degree or timing of helpfulness required, however, DHS adjudicates helpfulness based on the totality of the circumstances.

<sup>145</sup> Absent unreasonable actions that inhibit helpfulness, from a victim centered approach, helpfulness should not be a high bar. Some examples of helpfulness may include calling 911, having a rape kit performed, providing a description of offender or their whereabouts, allowing photographs to be taken, filing for a protection order, bringing a minor victim to court, or providing a statement about “other bad acts.”

<sup>146</sup> See Leslye E. Orloff, *U visa Certification and T visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors*, 70-75 (Aug. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor>.

<sup>147</sup> Press Release, Dep’t of Homeland Sec., DHS Takes Victim-Centered Approach on First Anniversary of Center for Countering Human Trafficking (Oct. 20, 2021), <https://niwaplibrary.wcl.american.edu/pubs/dhs-victim-centered-approach>.

needed, while in another case the prosecutor may have ten other witnesses who can testify and, therefore, the victim will not have to testify in order to establish eligibility as long as they were available to assist as necessary.

Victims of qualifying criminal activities qualify for a U visa and for U visa certification if the victim has been, is being, or is willing to be helpful without regard to whether:<sup>148</sup>

- ▶ A criminal case is initiated against the perpetrator;
- ▶ The criminal activity results in a prosecution;
- ▶ A warrant is issued for the arrest of the perpetrator;
- ▶ The warrant issued but cannot be served because the perpetrator absconded after a warrant was issued for the perpetrator's arrest;
- ▶ The perpetrator was detained and removed from the United States by DHS and cannot be served with the warrant in the criminal case;
- ▶ The perpetrator is charged and prosecuted for a crime that is not a U visa qualifying crime (*e.g.*, a drug offense) so as long as a qualifying crime was at the least detected and reported;
- ▶ The case is dismissed because the police mishandled evidence; conducted an unlawful search or other similar issues; or
- ▶ The perpetrator is ultimately convicted of any criminal activity.

#### Ongoing Assistance Required – Exception When Victim's Refusal to Cooperate is Not Unreasonable

It is critical for victims who are reporting criminal activity to understand that although they can obtain U visa status based on reporting criminal activity, the applicant is required to provide ongoing assistance when reasonably requested by certifying agency officials to obtain a U visa and lawful permanent residency based on the U visa. Although it is not required that the case be carried through and prosecuted, DHS requires the applicant to continue to cooperate as needed throughout the duration of the U visa status.<sup>149</sup>

USCIS will access the victim's ongoing, or continuing, cooperation after filing but before issuance of the U visa and when U visa holder victims apply for lawful permanent residence. This ongoing assistance requirement is separate and distinct from the initial helpfulness assessment made by certifying agencies signing U visa certifications before the victim's U visa application is filed. In the language of the Violence Against Women Act, to certify a U visa, the immigrant victim must demonstrate they have been helpful, is being helpful, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of the perpetrator.<sup>150</sup> Once the immigrant victim obtains a certification and file their U visa application, U visa regulations impose a responsibility upon the U visa applicant to provide

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<sup>148</sup> The following examples are illustrative of the range of issues that can arise criminal investigations and prosecutions and do not reflect a complete or full list.

<sup>149</sup> 8 C.F.R. § 214.14(b)(3) (2008).

<sup>150</sup> 8 U.S.C. § 1184(p)(1).



ongoing assistance when reasonably required by law enforcement, prosecutors, or other certifying officials.<sup>151</sup>

In order for U visa holders to obtain lawful permanent residency, the victim must prove ongoing cooperation.<sup>152</sup> There are two exceptions to this rule. A victim can be granted a U visa and lawful permanent residency as a U visa holder if they demonstrate that the request for assistance was unreasonable<sup>153</sup> and/or that their refusal to cooperate was not unreasonable.<sup>154</sup>

Reasonableness of the request depends upon the “totality of the circumstances taking into account general law enforcement and prosecutorial practices, the nature of the victimization, and the specific circumstances of the victim, including fear, traumatization (both mental and physical), and the age and maturity of young victims.”<sup>155</sup>

There is an exception for immigrant crime victims who demonstrate to DHS that their failure to provide ongoing cooperation with reasonable requests for assistance was not unreasonable. The following are a few common examples of when a victim’s lack of helpfulness is not unreasonable:

- When perpetrators, through coercion and/or threats, make the victim unavailable for trial;
- When a victim reasonably fears for her safety or her children’s safety;
- When a victim’s ongoing cooperation in the criminal investigation may jeopardize the victim’s safety or the safety of their family members in the U.S. or abroad
- When perpetrators actively limit the victim’s ability to leave the house, travel or movement, precluding her participation in investigative interviews or appearing to testify at trial;
- When perpetrators use threats of deportation and calls report victims to DHS for immigration enforcement to convince victims not to continue cooperation with law enforcement or prosecutors;
- When perpetrators threaten victims that their continued cooperation with law enforcement and/or prosecutors will result in the perpetrator ensuring that the victim will lose contact with, access to or custody of their children;
- When a victim fears retaliation from the perpetrator if they testify at trial;
- In a domestic violence case in which the victim continues to live with the abuser, has children with the abuser, or is economically dependent on the abuser.

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<sup>151</sup> U visa Certification and T visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors, 72 (Aug. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor>.

<sup>152</sup> 8 C.F.R. § 245.24(b)(4) (2008).

<sup>153</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY, 72 Fed. Reg. 53,018 (Congress intended to “facilitate the investigation and prosecution of criminal activity which immigrants are targets while providing protection for victims”).

<sup>154</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY, 72 Fed. Reg. 53,018 (Congress intended to “facilitate the investigation and prosecution of criminal activity which immigrants are targets while providing protection for victims.”)

<sup>155</sup> 8 C.F.R. § 214.11(a)

If the victim received reasonable requests for cooperation and did not provide assistance to law enforcement or prosecutors, the victim risks that the certifying official will deem the victim's non-cooperation unreasonable and will contact DHS to provide information about the victim's non-cooperation. DHS may then act on this information to initiate a process for revoking the U visa and in the adjudication of the victim's application for lawful permanent residency.<sup>156</sup>

It is important for advocates and attorneys working with U visa victims to develop good communication and working relationships with law enforcement and prosecution officials so that victim advocates can explain the immigrant victim's safety concerns that led to their decision to not continue cooperation. Law enforcement and prosecution officials who understand the victim's difficulties and safety concerns, and understand that immigrant victims, like many other victims of domestic violence, sexual assault, and stalking may reasonably choose not to continue to be involved the criminal case against the perpetrator. It is also helpful when working with law enforcement and prosecutors to inform them that non-cooperating victims will be unable to attain lawful permanent residency through the U visa unless the immigrant victim proves to DHS that their failure to offer ongoing cooperation was not unreasonable to DHS' satisfaction.<sup>157</sup>

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<sup>156</sup> C.F.R. § 214.14(h)(2)(i)(A) & (ii) (DHS may revoke U visa status if a certifying official revokes a signed Certification in writing); *see also* Department of Homeland Security, *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement*, 7 (Nov. 30, 2015), <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015>.

<sup>157</sup> The analysis to determine whether a victim's non-cooperation was unreasonable is 1) was the request by police or prosecutors reasonable, if yes, then 2) was the victim's refusal unreasonable. *See* 8 C.F.R. § 214.14(b)(3) and 8 C.F.R. § 245.24(2)(2)(ii) for the first prong; *see also* 8 C.F.R. § 245.24(a)(5) for the second prong. *See also* Leslye E. Orloff et. al., *U visa Certification and T visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors*, 72-73 (Aug. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor>.

## Which Family Members of U visa Holders Are Eligible to Receive a Bona Fide Determination and U visa?

Certain family members of U visa applicants may be included in victims' applications and will also be eligible to receive U visas.<sup>158</sup> A U visa victim may include U visa petitions for their family members along with the victim's own U visa application or the victim may submit U visa applications for their family members at a later time.<sup>159</sup> Victims may wait until after they are awarded a U visa to file U visa petitions for family members, particularly those family members residing abroad. While there is a numerical cap of 10,000 U visas per year on the number of U visas awarded immigrant crime victims, there is no annual numerical cap on the number of U visas that can be issued to the spouses, children, parents, or siblings of U visa recipients.<sup>160</sup>

Family members may include the U visa victim's spouse and children who are under 21 at the time that the U visa application is filed.<sup>161</sup> Prior to the VAWA 2013 amendments, children included in their parent's U visa application who turned 21 before their parent's application was adjudicated "aged out" of U visa protections at age 21. VAWA 2013 amended the law to allow children included in their parents' U visa application to receive U visas regardless of whether they turn 21 during the petition's review.<sup>162</sup>

Victims under the age of 21, may also request U visas for their parents and unmarried siblings (under age 18).<sup>163</sup> A sibling's age is determined as of the date when the sibling's U visa application is filed.<sup>164</sup> Children born after the application is approved are also considered qualifying family members as long as an additional application is filed on their behalf.<sup>165</sup> Perpetrators of battery or extreme cruelty or human trafficking who are family members of the U visa petitioners are not eligible to gain U visa status as a dependent family member of the U visa victim.<sup>166</sup>

As discussed above, U visa victim applicants and qualifying family members undergo a bona fide determination process to determine eligibility for work authorization and deferred action. A qualifying family member is not guaranteed a bona fide determination simply because the U visa victim applicant received a bona fide determination. If the U visa applicant is not granted a bona fide determination, the qualifying member will not be considered for bona fide

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<sup>158</sup> Qualifying family members are sometimes called a derivative or beneficiary applicant of the principal applicant, the immigrant victim.

<sup>159</sup> Qualifying family members may be added to the immigrant victim applicant's case by submitting an I-918 Supplement A form. USCIS should send a confirmation or receipt notice that the added family member was linked to the underlying case. It is important to submit credible evidence establishing a qualifying family relationship between the immigrant victim and the family member. *See also* 3 USCIS-PM C.5(A)(2).

<sup>160</sup> INA § 214(o); 8 U.S.C. § 1184(o).

<sup>161</sup> INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

<sup>162</sup> "Aging out" was a process that cut off eligibility of children who turned 21 while their petition was being considered and prior to the case being adjudicated. However, VAWA § 805(a) and INA § 214(p) 8 U.S.C. 1184(p)(7)(A) have amended this position.

<sup>163</sup> INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

<sup>164</sup> 8 C.F.R. § 214.14(f)(4) (2008).

<sup>165</sup> 8 C.F.R. § 214.14(f)(4)(i) (2008).

<sup>166</sup> 8 C.F.R. § 214.14(f)(1) (2008).

determination.<sup>167</sup> If the U visa victim applicant is granted a bona fide determination, the USCIS will conduct an individualized bona fide determination of each family member’s petition by assessing credible evidence of the qualifying family relationship and conducting background and security checks to determine if each individual family member should also be granted a bona fide determination.<sup>168</sup> As discussed above with regard to the primary U visa applicant, in making bona fide determinations for U visa family members USCIS may use its discretion to grant a bona fide determination to who it determines merit a favorable exercise of discretion, considering any risk to national security or public safety.<sup>169</sup>

There are no appeals of bona fide determination denials and there is no process to request that a bona fide determination be reopened, reapplied for or reconsidered,<sup>170</sup> so, it is important for counsel and the victims’ advocates to carefully screen for and review all potential red flags<sup>171</sup> and inadmissibility bars<sup>172</sup> with U visa applicants and all qualifying family members. Doing so would permit applicants and qualifying family members to fully address in the initial U visa application any potential adverse discretionary factors that could negatively<sup>173</sup> impact a positive bona fide determination. For example, if the U visa victim applicant submitted a petition for a qualifying family member that has been convicted of or arrested for certain criminal acts that may have been related to the crime victimization,<sup>174</sup> counsel for the U visa applicant victim will need to fully explain in the family member’s and the U visa victim’s U visa applications why USCIS should exercise its discretion to grant a U visa to this family member with a criminal history.

If the issue is not addressed adequately in the U visa application of the family member, USCIS will not issue a bona fide determination for the family member and will instead issue a request for evidence to address deficiencies or concerns identified in the family member’s record.<sup>175</sup> The family member will give the opportunity to resolve any deficiencies or concerns in the record and if they do so successfully the case will be placed in line for waitlist adjudication.<sup>176</sup> This waitlist adjudication will include a comprehensive review of the available

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<sup>167</sup> 3 USCIS-PM C.5(A)(2).

<sup>168</sup> 3 USCIS-PM C.5(A)(2).

<sup>169</sup> 3 USCIS-PM C.5(B).

<sup>170</sup> 3 USCIS-PM C.5(C).

<sup>171</sup> Identifying potential issues a client crime victim may have, better prepares advocates and attorneys who are not immigration experts screen the immigrant victims of domestic violence, sexual assault and human trafficking and determine whether they need support from an immigration attorney with particular expertise in working on cases of immigrant crime victims. *See* VAWA Red Flags (July 16, 2015), <https://niwaplibrary.wcl.american.edu/pubs/vawa-red-flags>.

<sup>172</sup> Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases (Dec. 26, 2022), <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>173</sup> 3 USCIS-PM C.5(B).

<sup>174</sup> These categories of criminal acts generally overlap with inadmissibility grounds and may include national security concerns INA 212(a)(3); murder, rape, or sexual abuse; offenses involving firearms, explosive materials, or destructive devices (Such as those defined in INA 101(a)(43)(C) and (E)); Offenses relating to peonage, slavery, involuntary servitude, and trafficking in persons (as defined in INA 101(a)(43)(K)(iii)); or aggravated assault. For more *see* 3 USCIS-PM C.5(B).

<sup>175</sup> 3 USCIS-PM C.5(C)(5).

<sup>176</sup> 3 USCIS-PM C.5(C)(5); *see also* USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 6 – WAITING LIST, [3 USCIS-PM C.6] (Last updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6>.

evidence to determine whether the qualifying member to waive any grounds for inadmissibility.<sup>177</sup> However, this process could result in years of delay in the family member's case because they must await full waitlist adjudication in order by filing date and only after waitlist approval do they receive work authorization and deferred action.<sup>178</sup> It is important to note as well that, if USICS does not receive a response to the RFE that is sufficient to move the case forward to waitlist adjudication, USCIS will deny the petition.

### **If A Crime That Violated U.S. Law Occurred Abroad, Will It Qualify for U visa Purposes?**

The final U visa requirement is that the criminal activity must either occur in the United States or violate U.S. laws.<sup>179</sup> Crimes are considered by DHS to have occurred in the United States if the crime was committed in any of the following locations:

- ▶ Indian land including any Indian reservation within United States jurisdiction, dependent Indian communities, and Indian allotments;<sup>180</sup>
- ▶ Military installations including transportation (vessels, aircrafts) under Department of Defense jurisdiction or military control or lease;<sup>181</sup>
- ▶ United States territories including American Samoa, Swain Islands, Bajo Nuevo (the Petrel Islands), Baker Island, Howland Island, Jarvis Island, Johnston Atoll, Kingman Reef, Midway Atoll, Navassa Island, Northern Mariana Islands, Palmyra Atoll, Serranilla Bank, and Wake Atoll;<sup>182</sup>
- ▶ Guam, Puerto Rico, and the U.S. Virgin Islands.<sup>183</sup>

For U visa purposes, for a criminal activity that occurred outside of the United States to be considered qualifying criminal activity there must be a U.S. federal statute that creates extraterritorial jurisdiction and allows for prosecution of that crime in the United States. For example, violation of the federal statute that allows for prosecution of U.S. citizens and nationals who engage in illicit sexual conduct outside the United States, such as sexual abuse of a minor, would be considered a violation of U.S. law for U visa purposes.<sup>184</sup>

While the criminal activity must have occurred in the U.S. or must have been in violation of a U.S. federal statute extending extraterritorial jurisdiction, it is important to note that the victim need not be in the United States in order to apply for a U visa.<sup>185</sup> Victims may file U visa applications from abroad but must be filed with the VAWA Unit of the USCIS Vermont Service Center.<sup>186</sup> Victims may file from abroad for a number of reasons. For some, the qualifying

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<sup>177</sup> 3 USCIS-PM C.5(B).

<sup>178</sup> 3 USCIS-PM C.5(C)(5).

<sup>179</sup> INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

<sup>180</sup> 8 C.F.R. § 214.14(a)(4) (2008).

<sup>181</sup> 8 C.F.R. § 214.14(a)(6) (2008).

<sup>182</sup> 8 C.F.R. § 214.14(a)(11) (2008).

<sup>183</sup> INA § 101(a)(38); 8 U.S.C. § 1101(a)(38).

<sup>184</sup> 8 C.F.R. § 214.14(b)(4) (2008).

<sup>185</sup> 8 C.F.R. §§ 214.14(c)(5)(i)(A)-(B) (2008).

<sup>186</sup> 8 C.F.R. § 214.14(c)(1) (2008). *See also* Corrin Chow and Rocio Molina, *USCIS Announces New filing Location* (Sept. 21, 2020), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-filing-vsc-nsc>; Corrin Chow and Rocio Molina, *Map of New USCIS Filing Locations for U visa and Lawful Permanent Residency Forms* (July 24, 2020), <https://niwaplibrary.wcl.american.edu/pubs/map-of-dhs-new-uscis-filing-locations>.

criminal activity may have occurred abroad. Other victims may be filing for U visa protection from abroad because their abuser took the victim abroad and then stranded them there with no means to reenter the United States. U visa applicants applying outside of the United States, however, are not eligible for a Bona Fide Determination, work authorization and deferred action.<sup>187</sup>

Applicants outside the United States proceed to waiting list adjudication. Applicants who are granted waitlist approval of their U visa application, must then await the availability of a visa to receive a full adjudication of their application and be granted a U visa. If applicants receive waitlist approval, then their case awaits full adjudication which occurs in receipt date order.<sup>188</sup> U visa applicants and their family members living abroad are not granted permission to enter the United States until their U visa application has been approved. Victims who receive waitlist approval should consult with an immigration lawyer with expertise on U visa cases to determine whether they an application for humanitarian parole might be a viable option for the U visa applicant and/or their qualifying family members.<sup>189</sup>

## Removal Proceedings

### Victims Currently in Removal Proceedings

Victims currently in removal proceedings in immigration court are eligible to file U visa applications with USCIS.<sup>190</sup> U visa applicants and the family members the victim has included in their applications are eligible once their U visa cases have been filed to have any open case against them in immigration court either dismissed without prejudice as an exercise of DHS prosecutorial discretion or administratively closed by the immigration judge.<sup>191</sup> Victims and their family members granted bona fide determinations have strong cases for dismissal without prejudice. However, U visa applicant victims and family members are able to request that ICE take a victim centered approach<sup>192</sup> to the victim's case and exercise its discretion to seek dismissal without prejudice without having to await a bona fide determination.<sup>193</sup>

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<sup>187</sup> 3 USCIS-PM C.5(C)(7)(deferred action is an exercise of prosecutorial discretion and is only applicable to noncitizens in the United States. Under INA 274A, the Secretary of Homeland Security, and USCIS as their designee, has authority over noncitizen employment authorization in the United States).

<sup>188</sup> 3 USCIS-PM C.5(C)(5).

<sup>189</sup> USCIS Accepts the Ombudsman's Recommendation to Adopt Parole Policy for U Visa Petitioners and Family Members (Sept. 7, 2016), <https://niwaplibrary.wcl.american.edu/pubs/waitlist-approved-us-and-family-member-parole>.

<sup>190</sup> 8 CFR § 214.14(c)(1)(i). As a matter of discretion, counsel for ICE may agree to file, at the request of the alien petitioner, a joint motion to terminate proceedings without prejudice with the immigration judge or Board of Immigration Appeals while USCIS adjudicates a petition for U nonimmigrant status.

<sup>191</sup> 8 C.F.R. §§ 214.14(c)(1)(i), (f)(2)(i) (2008); David L. Neal, Guidance for adjudicators on administrative closure in light of *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021), 3-4 (Nov. 22, 2021), [https://niwaplibrary.wcl.american.edu/pubs/22-03\\_eoir\\_admin\\_closure](https://niwaplibrary.wcl.american.edu/pubs/22-03_eoir_admin_closure).

<sup>192</sup> U.S. DEP'T OF HOMELAND SEC., DHS TAKES VICTIM-CENTERED APPROACH (2021), <https://niwaplibrary.wcl.american.edu/pubs/dhs-victim-centered-approach>.

<sup>193</sup> Kerry E. Doyle, *Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion*, U.S. Dep't of Homeland Sec., Immigr. and Customs Enf't, U.S. Immigration and Customs Enforcement (Apr. 3, 2022), <https://niwaplibrary.wcl.american.edu/pubs/opla-imm-enforce-guide-2022>.

Immediately following the victim's filing of a U visa case, the victim's attorney<sup>194</sup> should notify the DHS, Immigration and Customs Enforcement (ICE) Office of Chief Counsel (OCC), the ICE trial attorney, and the immigration court of the fact that the U visa case has been filed. DHS policy places the responsibility for requesting that the Victims and Trafficking Unit expedite<sup>195</sup> adjudication of the U visa case on DHS trial attorneys and the Office of Chief Counsel.<sup>196</sup> Attorneys representing immigrant victim U visa applicants should take all steps needed to assure that ICE submits, and the Victims and Trafficking Unit receive ICE's expedite request. The immigration judge cannot submit an expedite request to USCIS and expedite requests submitted by victim's counsel<sup>197</sup> are approved only in very limited circumstances.<sup>198</sup>

Under policies issued by DHS on September 24, 2009,<sup>199</sup> August 20, 2010,<sup>200</sup> June 14, 2021,<sup>201</sup> and on April 3, 2022,<sup>202</sup> upon receiving notification that a U visa application has been filed with USCIS, the ICE Office of Chief Counsel is required to:

- Notify the Victims and Trafficking Unit at the Vermont or Nebraska Service Center of the filing,
- Request expedited adjudication of the U visa case,
- Immediately transfer the immigrant victim's case file (A-file) to the Victims and Trafficking Unit at the Vermont or Nebraska Service Center,
- When the victim has been detained, make the victim available for any interview that the Vermont or Nebraska Service Center may require.<sup>203</sup>

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<sup>194</sup> Almost 92% of U visa applicants are represented by counsel, whereas about 5% file with a preparer and only 3% file U visas pro se. *See* USCIS, U Visa Demographics (Mar. 2020), <https://niwaplibrary.wcl.american.edu/pubs/uscis-u-visa-demographics>.

<sup>195</sup> USCIS, POLICY MANUAL: VOL. 3, PART C, CHAPTER 6 – WAITING LIST [USCIS-PM C.6] (Last updated July 6, 2023) <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-6>.

<sup>196</sup> John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 3 (DHS, U.S. Immigration and Customs Enforcement, Aug. 20, 2010) (“No obligation for such requests shall be placed on the alien's attorney, accredited representative, or the immigration judge”). This policy applies to pending applications for immigration relief including VAWA, T and U visa cases.

<sup>197</sup> John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 3 (DHS, U.S. Immigration and Customs Enforcement, Aug. 20, 2010) (“No obligation for such requests shall be placed on the alien's attorney, accredited representative, or the immigration judge.”) This policy applies to pending applications for immigration relief including VAWA, T and U visa cases.

<sup>198</sup> USCIS, HOW TO MAKE AND EXPEDITE REQUEST (2022), <https://www.uscis.gov/forms/filing-guidance/how-to-make-an-expedite-request>; *see also* USCIS, POLICY MANUAL: VOL. 1, PART A – PUBLIC SERVICES – CHAPTER 5 – REQUESTS TO EXPEDITE APPLICATIONS OR PETITIONS [1 USCIS-PM A.5] (Last Updated June 14, 2023) <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-5>; USCIS Policy Alert (PA-2021-12), USCIS Expedite Criteria and Circumstances (June 9, 2021), <https://niwaplibrary.wcl.american.edu/pubs/policy-alert-uscis-expedite-criteria>.

<sup>199</sup> Memorandum from David Venturella, Acting Dir., U.S. Immgr. And Customs. Enf't, Guidance Adjudicating Stay Requests Filed by U Nonimmigrant Status (U visa) Applicants (Sept. 24, 2009).

<sup>200</sup> John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 2 (DHS, U.S. Immigration and Customs Enforcement, Aug. 20, 2010).

<sup>201</sup> USCIS Policy Alert (PA-2021-13), Bona Fide Determination Process for Victims of Qualifying Crimes, and Employment Authorization and Deferred Action for Certain Petitioners (June 14, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-bona-fide>.

<sup>202</sup> Memorandum from Kerry E. Doyle, Principal Legal Advisor, U.S. Immigr. and Customs Enf't, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion 4, 5 (Apr. 3, 2022) <https://niwaplibrary.wcl.american.edu/pubs/opla-imm-enforce-guide-2022>.

- Upon receipt of a copy of the U visa filing from the victim’s attorney, review the filing to determine if as a matter of law, the immigrant victim is eligible for relief from removal (e.g., the victim is granted a bona fide determination or it appears likely that the victim will be granted a bona fide determination, and later a U visa), the Office of Chief Counsel should<sup>204</sup>—
  - Promptly move to dismiss the immigration court case without prejudice;<sup>205</sup> and
  - If the victim is detained, secure the victim’s release from detention.

Upon receiving a U visa filing and the transfer of the applicant’s case file (A-file) from Office of Chief Counsel, the Victims and Trafficking Unit will endeavor to adjudicate cases referred by ICE in a reasonably timely manner whether the victim is detained or not detained.

Should the ICE Office of Chief Counsel fail to move to dismiss the U visa applicant’s pending immigration court case, victim’s counsel should seek to have the immigration judge administratively close the victim’s immigration court case while the victim’s U visa application is adjudicated. On July 15, 2021, the Attorney General issued a precedential decision<sup>206</sup> restoring the ability of immigration judges to administratively close cases. Administrative closure serves “to facilitate the exercise of prosecutorial discretion, allowing government counsel to request that certain low-priority cases be removed from immigration judges’ active calendars or the Board’s docket, thereby allowing adjudicators to focus on higher-priority cases.”<sup>207</sup> Administrative closure by an immigration judge is an option available to U visa victims who are likely to succeed in obtaining a bona fide determination and/or a U visa application.<sup>208</sup>

Victim’s counsel should ask ICE to join or not oppose the victim’s motion for administrative closure of the victim’s immigration case and can proceed to have the immigration judge adjudicate the request even when ICE opposes the motion.<sup>209</sup> In considering requests by U visa applicants for administrative closure, 2022 policies state that immigration judges should ask ICE trial attorneys whether the victim’s case is an immigration enforcement priority, if not judges should be asking ICE attorneys to explain whether and if DHS intends to exercise some

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<sup>203</sup> As of Dec. 2010, the Vermont Service Center has not required interviews with victims in connection with the adjudication of U visa cases.

<sup>204</sup> John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 2-3 (DHS, U.S. Immigration and Customs Enforcement, Aug. 20, 2010).

<sup>205</sup> This new process should significantly reduce the need for attorneys representing immigrant victims to seek agreement from the DHS trial attorney to file a joint motion to terminate removal proceedings under 8 C.F.R. §§ 214.14(c)(1)(i), 214.14(f)(2)(i) (2008).

<sup>206</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021).

<sup>207</sup> *Matter of Cruz-Valdez*, 28 I&N Dec. 326 (A.G. 2021); David L. Neal, GUIDANCE FOR ADJUDICATORS ON ADMINISTRATIVE CLOSURE IN LIGHT OF *MATTER OF CRUZ-VALDEZ*, 28 I&N Dec. 326 (A.G. 2021) (Nov. 22, 2021), [https://niwaplibrary.wcl.american.edu/pubs/22-03\\_eoir\\_admin\\_closure](https://niwaplibrary.wcl.american.edu/pubs/22-03_eoir_admin_closure).

<sup>208</sup> David L. Neal, GUIDANCE FOR ADJUDICATORS ON ADMINISTRATIVE CLOSURE IN LIGHT OF *MATTER OF CRUZ-VALDEZ*, 28 I&N Dec. 326, 3 (A.G. 2021) (Nov. 22, 2021), [https://niwaplibrary.wcl.american.edu/pubs/22-03\\_eoir\\_admin\\_closure](https://niwaplibrary.wcl.american.edu/pubs/22-03_eoir_admin_closure).

<sup>209</sup> David L. Neal, GUIDANCE FOR ADJUDICATORS ON ADMINISTRATIVE CLOSURE IN LIGHT OF *MATTER OF CRUZ-VALDEZ*, 28 I&N Dec. 326 (A.G. 2021), 3-4 (Nov. 22, 2021), [https://niwaplibrary.wcl.american.edu/pubs/22-03\\_eoir\\_admin\\_closure](https://niwaplibrary.wcl.american.edu/pubs/22-03_eoir_admin_closure).



form of prosecutorial discretion regarding the victim in the case.<sup>210</sup>

For all cases of U visa victims with open cases in immigration court, attorneys representing U visa victims should take all steps necessary to ensure that the U visa case filed is complete, contains all available evidence, and puts forth the strongest case possible for the U visa victim. When this occurs ICE will be more likely to move to dismiss the immigration case without prejudice and USCIS will be able to move more swiftly when they receive requests to expedite adjudication of U visa cases. If a request for further evidence is issued, attorneys must respond quickly to requests. It is recommended that attorneys for U visa applicants with cases before the immigration court also communicate through the Victims and Trafficking Unit hotline<sup>211</sup> or e-mail<sup>212</sup> with VAWA Supervisors to also request expedited review of the case and to learn about any additional evidentiary needs of adjudicators and provide requested information swiftly.<sup>213</sup>

If a victim's or family member's U visa case was dismissed without prejudice or administratively closed and subsequently the victim's or family member's U visa application is denied, the applicant may be reissued a *Notice to Appear* and once again placed in removal proceedings.<sup>214</sup> If the victim received a stay of removal from either the immigration court or DHS if the victim's or a family member's U visa application is denied the order to stay the removal will be terminated on effective the date of the denial of the U visa application by USCIS.<sup>215</sup>

### Victims with Prior Orders of Removal<sup>216</sup>

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<sup>210</sup> David L. Neal, GUIDANCE FOR ADJUDICATORS ON ADMINISTRATIVE CLOSURE IN LIGHT OF *MATTER OF CRUZ-VALDEZ*, 28 I&N Dec. 326 (A.G. 2021), 3-4 (Nov. 22, 2021), [https://niwaplibrary.wcl.american.edu/pubs/22-03\\_eoir\\_admin\\_closure](https://niwaplibrary.wcl.american.edu/pubs/22-03_eoir_admin_closure).

<sup>211</sup> The Vermont Service Center VAWA Hotline is 1-802-527-4888. If you cannot get a hold of the VAWA Hotline, please contact the National Immigrant Women Advocacy Project for technical assistance at [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu) or (202) 274-4457.

<sup>212</sup> Attorneys representing immigrant victims should elect to communicate with Victims and Trafficking Unit supervisors by either telephone or e-mail—not both. For U visas the email for the Nebraska Service Center is [nsc.i-918inquiries@uscis.dhs.gov](mailto:nsc.i-918inquiries@uscis.dhs.gov) and for the Vermont Service Center is [HotlineFollowupI918I914.vsc@uscis.dhs.gov](mailto:HotlineFollowupI918I914.vsc@uscis.dhs.gov).

<sup>213</sup> For technical assistance in cases of victims in proceedings before an immigration judge contact: Immigration Technical Assistance for Survivors (ASISTA) at (515) 244-2469, [questions@asistahelp.org](mailto:questions@asistahelp.org), [www.asistahelp.org](http://www.asistahelp.org); or National Immigrant Women Advocacy Project, [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu), (202) 274-4457, <http://www.wcl.american.edu/niwap/>

<sup>214</sup> 8 C.F.R. §§ 214.14(c)(5)(ii), (f)(6)(iii) (2008).

<sup>215</sup> The TVPRA 2008, Section 204, for which there is currently no rule, provides that DHS has the authority to grant stays of removal to persons with pending T and U visa applications that will last through granting of the T or U visa and if the case is denied will last through the exhaustion of administrative appeals. Applicants granted stays shall not be removed from the United States. A denial of a stay under this provision does not preclude an individual from applying for a stay, deferred action, or a continuance under other immigration provisions. This provision does not preclude DHS or DOJ from granting stays of removal or deportation under other immigration provisions.

<sup>216</sup> Victim advocates and attorneys working with U visa victims who have prior orders of removal should immediately contact NIWAP at (202) 274-4457 or [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu) to be connected with an expert in immigration and U visa adjudication to review and discuss potential avenues for cancelling any orders of removal issued against the U visa applicant or any U visa applicant family members.

Victims who have a final order of removal open against them are fully eligible to file a U visa application with DHS.<sup>217</sup> However, filing the U visa application will not in and of itself prevent ICE from acting on the applicant's removal.<sup>218</sup> In cases where an order of exclusion, deportation, or removal against the victim was issued by an immigration judge or the Board of Immigration Appeals (BIA), the applicant victim may seek cancellation of such order by simultaneously filing, with the immigration judge or the BIA, a motion to reopen and dismiss without prejudice or administratively close removal proceedings.<sup>219</sup>

These motions should be pursued as early as possible following the filing of the U visa application for victims with open removal orders that have been issued against them. While victims may have a stronger case for having their case reopened after they receive a bona fide determination,<sup>220</sup> victims need not wait for a bona fide determination to be able to gain ICE agreement to join the motion to reopen and dismiss or administratively close cases of victims with pending U visa applications. ICE trial attorneys are encouraged to join motions to reopen and dismiss proceedings when a victim has a pending U visa application allowing the victim to proceed with their U visa application without risk of removal from the U.S.<sup>221</sup> As discussed in the previous section, in cases where the victim has a prior removal order it is even more important for the U visa application as initially filed be as complete, well documented, and persuasive as possible.

Filing a motion to reopen and a motion to dismiss or administratively close the immigration court proceedings may or may not be granted by the immigration judge depending on various factors. In these cases, U visa applicant victims will need to request that the immigration judge reopen the victim's immigration case in order to issue a stay of deportation or removal. The immigration judge's stay of removal remain in place until the victim receives a bona fide determination and can renew their request for dismissal of the removal proceedings.

Once a U visa applicant victim or family member who is subject to an ICE issued administrative final removal order has a pending U visa application, the U visa applicant's attorney should request that ICE issue a stay of removal. A stay of deportation or removal is an administrative decision by DHS to temporarily stop the deportation or removal of an applicant

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<sup>217</sup>NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53037 (Sept. 17, 2007) 8 C.F.R. §§ 214.14(a)(3), (c)(1)(ii), (f)(2)(ii) (2008).

<sup>218</sup>NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53037 (Sept. 17, 2007).

<sup>219</sup>NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53022 (Sept. 17, 2007).

<sup>220</sup> The bona fide determination provides deferred action and work authorization to the U visa applicant. 3 USCIS-PM C.5(C)(6) (Request to Renew). An initial bona fide determination does not guarantee future renewals and USCIS retains the right to revoke employment authorization or terminate deferred action if USCIS determines there is a national security or public safety, if the bona fide work authorization and deferred action is no longer warranted, if the law enforcement certification is withdrawn, or if USCIS determines the prior bona fide work authorization was issued in error. *See also* 8 C.F.R. § 274(a)(14)(b).

<sup>221</sup> Memorandum from Kerry E. Doyle, Principal Legal Advisor, U.S. Immigr. and Customs Enf't, Guidance to OPLA Attorneys Regarding the Enforcement of Civil Immigration Laws and the Exercise of Prosecutorial Discretion 14-15 (Apr. 3, 2022) <https://niwaplibrary.wcl.american.edu/pubs/opla-imm-enforce-guide-2022>. 14

who has been ordered deported or removed from the United States.<sup>222</sup> ICE policies encourage issuance of stays of removal both for victims with pending U visa applications and for victims with bona fide determinations.<sup>223</sup> Additionally, if a U visa applicant with an ICE issued removal order is not granted a bona fide determination, an application for a discretionary stay of removal must be filed on the victim's behalf with DHS.<sup>224</sup> This will stay their removal pending a decision on their U visa application's full adjudication.<sup>225</sup>

When a U visa is granted, any order of removal, exclusion, or deportation issued by DHS will be cancelled by operation of law effective on the date the U visa is approved.<sup>226</sup> If the victim granted a U visa is subject to a removal order issued by an immigration judge, has a removal proceeding that is open, or a removal proceeding that was administratively closed, the victim will need to file a motion to re-calendar or reopen and terminate the immigration court proceedings before the immigration judge.<sup>227</sup> For victims granted U visas who have exceeded either or both time and numerical limitations for filing motions to reopen, the victim's attorney will need to seek agreement from the DHS trial attorney to join in the U visa holder victim's motion to re-calendar or re-open.<sup>228</sup> DHS policy directives issued in August of 2010 should potentially improve the ease with which DHS trial counsel should agree to join in these motions, as these will be cases in which the victim, as a matter of law, is a U visa holder entitled to relief from removal.<sup>229</sup>

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<sup>222</sup> See 8 C.F.R. §§ 241.6, 1241.6 (2008); NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53015, 53016, 53022, 53023 (Sept. 17, 2007); 8 CFR §§ 214.14(c)(1)(ii), (f)(2)(ii); and 241.4 (2008).

<sup>223</sup> USCIS Directive 11005.3, USING A VICTIM-CENTERED APPROACH WITH NONCITIZEN CRIME VICTIMS, U.S. IMMIGR. AND CUSTOMS ENF'T, 8 (Aug. 10, 2022), <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>.

<sup>224</sup> To receive a stay of removal immigrant victims must file Form I-246, "Application for Stay of Removal;" 8 C.F.R. §§ 241.6(a), 1241.6(a) (2008).

<sup>225</sup> 8 C.F.R. §§ 214.14(c)(1)(ii), (f)(2)(ii) (2008).

<sup>226</sup> 8 C.F.R. §§ 214.14(c)(5)(i), (f)(6) (2008).

<sup>227</sup> CFR 214.14(c)(5)(i).

<sup>228</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR "U" NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53023 (Sept. 17, 2007.); 8 C.F.R. §§ 1003.2, 1003.23 (2008).

<sup>229</sup> Memorandum from John Morton, Assistant Sec'y, U.S. Immigr. and Customs Enf't, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 3-4 (Aug. 20, 2010).

## VAWA Confidentiality and Credible Evidence Standard

### VAWA Confidentiality (8 U.S.C. Section 1367)<sup>230</sup>

As with other types of cases under the Violence Against Women Act, DHS is required to keep all information about U visa applications confidential.<sup>231</sup> They cannot release information about the existence of a case, actions taken in the case, or information contained in the case file to any person with very limited statutory exceptions.<sup>232</sup> If the abuser or perpetrator of the crime, any family member of the abuser, or someone acting at the request of the abuser<sup>233</sup> provides information to DHS about the crime victim, DHS cannot rely solely upon that information to make an adverse decision on any other case the victim may be involved in<sup>234</sup> (e.g. pending application, removal action, and detention).<sup>235</sup> DHS is precluded from relying on information provided solely by the abuser, their family members or persons acting on the abuser's behalf initiate or take any part of an enforcement action against the victim.<sup>236</sup> DHS policies urge DHS enforcement officials to exercise prosecutorial discretion to avoid initiating enforcement actions against immigrant crime victims.<sup>237</sup>

### Credible Evidence Standard<sup>238</sup>

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<sup>230</sup> For more detailed information, training tools, webinars, and case law on VAWA confidentiality *see* VAWA Confidentiality Protections for Immigrant Crime Victims (Updated Mar. 8, 2021) <https://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools> and How VAWA Confidentiality Impacts Discover in Cases Involving Immigrant Survivors (Updated Nov. 18, 2022) <https://niwaplibrary.wcl.american.edu/discovery>.

<sup>231</sup> ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996 ("IIRAIRA") § 384, Pub. L. No. 104-208, 110 Stat. 3009-652 (2001); 8 U.S.C. § 1367. *See also* Jane Anderson and Benish Anver, Quick Reference Guide for Prosecutors: U visa and VAWA Confidentiality Related Case Law (July 24, 2017), <https://niwaplibrary.wcl.american.edu/pubs/quick-reference-guide-for-prosecutors-u-visa-and-vawa-confidentiality>.

<sup>232</sup> Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") § 384, Pub. L. No. 104-208, 110 Stat. 3009-652 (2001); 8 U.S.C. § 1367.

<sup>233</sup> USCIS Policy Alert (PA-2023-14), Safe Address and Special Procedures for Persons Protected by 8 U.S.C. 1367, 5 (Apr. 11, 2023), <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-policy-update-safe-address>.

<sup>234</sup> USCIS Policy Alert (PA-2023-14), Safe Address and Special Procedures for Persons Protected by 8 U.S.C. 1367, 2-3,7 (Apr. 11, 2023), <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-policy-update-safe-address>.

<sup>235</sup> USCIS Directive 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims, 3 (Aug. 10, 2022), <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>. Civil immigration enforcement action defined to include: Issuing a detainer; taking custody of a noncitizen subject to a previous detainer; issuing, reissuing, serving, filing, or canceling a Notice to Appear; stopping, questioning, or arresting a noncitizen for an administrative violation of the civil immigration laws; detaining or releasing from custody subject to conditions; granting deferred action or parole; and executing a final order of removal.)

<sup>236</sup> For further information about the confidentiality protections, *see* the chapter in this manual entitled "VAWA Confidentiality: History, Purpose and Violations." Leslye E. Orloff, VAWA Confidentiality: History, Purpose, DHS Implementation and Violations of VAWA Confidentiality Protections (Updated Apr. 25, 2019), <https://niwaplibrary.wcl.american.edu/pubs/ch3-vawa-confidentiality-history-purpose>.

<sup>237</sup> Memorandum from John P. Torres, Dir, U.S. Immgr. and Customs Enf't, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005, 2-3 (Jan. 22, 2007), <https://niwaplibrary.wcl.american.edu/pubs/interim-guidance-vawa-memo> and USCIS Directive 11005.3, Using a Victim-Centered Approach with Noncitizen Crime Victims (Aug. 10, 2022), <https://niwaplibrary.wcl.american.edu/pubs/ice-victim-centered-directive-11005-3>.

<sup>238</sup> For a full discussion of VAWA's any credible evidence rules, *see* Leslye E. Orloff, Kathryn C. Isom, and Edmundo Saballos, Mandatory U-Visa Certification Unnecessarily Undermines The Purpose Of The Violence

DHS is required to consider “any credible evidence” when deciding U visa cases and U visa holder’s applications for lawful permanent residency.<sup>239</sup> With regard to proof of eligibility for a U visa and for any decision DHS makes regarding a U visa victim’s case from initial filing to the filing for lawful permanent residency, DHS is prohibited from requiring any specific type of evidence in support of the application and must accept “any credible evidence” submitted to support each eligibility requirement. The credible evidence standard was first created by the Violence Against Women Act in the context of VAWA self-petitions and battered spouse waiver protections for women and children who are battered or subjected to extreme cruelty by a U.S. Citizen or Lawful Permanent Resident spouse or parent. It was developed with an understanding that victims of domestic violence and other violent crimes may have difficulty obtaining certain types of evidence.<sup>240</sup> The U visa certification (Form I-918, Supplement B) is the only exception to this rule. A victim must file a U visa certification as part of their U visa, or the application will be rejected as incomplete.

With the creation of a bona fide determination process in 2021, it is particularly important that the victim’s and all the victim’s family member’s initial U visa applications are as complete as possible and contain sufficient credible evidence to gain a bona fide determination from USCIS. The bona fide determination will provide the victim and each family member who receives this determination protection from deportation through deferred action, work authorization, and in some states, U visa applicants may become eligible for state funded public benefits.<sup>241</sup> If the application does not contain sufficient information for the U visa applicant to receive a bona fide determination, the applicant’s case and those of all qualifying family members will be sent a request for further evidence.<sup>242</sup> If the response provides sufficient evidence the case will be placed in an adjudication line for a waitlist determination which will take many years, delaying access to deferred action and work authorization until the case can be fully waitlist adjudicated or a U visa can be issued.<sup>243</sup> If a bona fide determination is not granted there is no ability to appeal that determination.<sup>244</sup>

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Against Women Act’s Immigration Protections And Its “Any Credible Evidence” Rules— A Call For Consistency, Vol. XI Georgetown Journal of Gender and the Law 619-647 (2010).

<sup>239</sup> 8 C.F.R. §§ 214.14(c)(4), (f)(5) (2008).

<sup>240</sup> As defined by INA 212(a)(3)(E). See INA § 204(a)(1)(J); 8 U.S.C. § 1154(a)(1)(J).

<sup>241</sup> Access to public benefits varies by state, by benefits program and by immigration status. To look up what state or federal public benefits an immigrant victim qualifies to receive go to: <https://niwaplibrary.wcl.american.edu/allstate-public-benefits-charts>.

<sup>242</sup> 3 USCIS-PM C.5(C); 3 USCIS-PM C.5C(1); 3 USCIS-PM C.5C(5).

<sup>243</sup> 3 USCIS-PM C.5(C); 3 USCIS-PM C.5C(1); 3 USCIS-PM C.5C(5).

<sup>244</sup> 3 USCIS-PM C.5(C) and endnote 24 (“the lack of an appeals process for BFD EADs aligns with regulatory practice pertaining to employment authorization generally”).

## Waiver of Inadmissibility<sup>245</sup>

There are several issues that can make an applicant for lawful immigration status inadmissible into the United States. For instance, applicants for admission to the U.S. who are in the United States unlawfully, have certain criminal convictions, or suffer from certain health conditions are deemed inadmissible by statute. However, Congress recognized that many U visa applicants will be inadmissible for one or more reasons and provided various waivers for these inadmissibility factors.<sup>246</sup> For most grounds of inadmissibility, including for unlawful entry into the U.S., a waiver is available if DHS determines that granting the victim a waiver is in the public or national interest.<sup>247</sup> Waivers are not available for applicants who have committed Nazi persecution, genocide, or an act of torture or extra judicial killing.<sup>248</sup> U visa victims who have committed violent or dangerous crimes and security-related crimes<sup>249</sup> will only be granted waivers upon a showing of extraordinary circumstances.<sup>250</sup>

VAWA 2013 created a special exception<sup>251</sup> for self-petitioners, battered spouse waiver, T visa, and U visa petitioners from the “public charge” inadmissibility.<sup>252</sup> This public charge exception for immigrant crime victims helps victims more easily access the public benefits safety net without risking being denied lawful permanent residency.<sup>253</sup>

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<sup>245</sup> Grounds of Inadmissibility (INA § 212(a)) – An individual who seeks admission into the United States or to receive lawful permanent residency must meet certain eligibility requirements to receive a visa and eventually be legally *admitted* into the United States. Grounds for *inadmissibility* include health related grounds, criminal and related grounds, security and related grounds, not meeting labor certification and qualifications, and illegally entering the country. An immigration officer deciding cases including T and U visa applications for the Department of Homeland Security will make inadmissibility determinations on cases they are adjudicating.

<sup>246</sup> Compare the different inadmissibility waivers available to U visa immigrant victims *at* <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>247</sup> For a detailed list of inadmissibility factors that do not apply, apply and can be waived, and for which no waivers are available in U visa cases *see* Limayli Huguet, et. al., Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases (Updated 2022)

<https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>248</sup> INA § 212(d)(14); 8 U.S.C. § 1182(d)(14).

<sup>249</sup> Described in INA §§ (212)(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii) or (3)(C).

<sup>250</sup> 8 C.F.R. § 212.17(b)(2) (2008).

<sup>251</sup> DHS Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472, 55514-15 (2022), <https://niwaplibrary.wcl.american.edu/pubs/dhs-final-public-charge-rule-2022>. Section 804 of VAWA 2013 specifically excludes noncitizens have been granted U visa status from the public charge ground of inadmissibility for purposes of establishing eligibility for adjustment of status. However, DHS believes that for the exemption to apply, the U visa status must hold and be valid at the time the I-485 is filed and throughout the pendency of the application per 8 CFR 214.14(g)(1). *See also* Catherine Longville and Leslye E. Orloff, Immigrant Crime Victims and Public Charge: Post-VAWA 2013 (Aug. 19, 2019), <https://niwaplibrary.wcl.american.edu/pubs/public-charge-ground-of-inadmissibility-and-immigrant-crime-victims>.

<sup>252</sup> Under INA § 212(a)(4); 8 U.S.C. § 1182(a)(4), the public charge bar to lawful permanent residency applies to immigrants who are “likely at any time to become a public charge determined by age; health; family status; assets, resources, and financial status; and education and skills.

<sup>253</sup> DHS Public Charge Ground of Inadmissibility, 87 Fed. Reg. 55472, 55514 (III)(G) (2022), <https://niwaplibrary.wcl.american.edu/pubs/dhs-final-public-charge-rule-2022>. When applying for adjustment of lawful permanent resident status, a U visa applicant must hold and be in valid U nonimmigrant status at the time of filing Form I-485 and throughout the pendency of the application in order to waive the public charge ground of inadmissibility.

It is extremely important that all victims who may qualify for a U visa or another form of immigration relief be screened as early as possible to identify difficult issues or “red flags”<sup>254</sup> that could complicate the victim’s immigration case. It is critical that advocates and attorneys working with immigrant victims fully review the list of potentially adverse factors in the victim’s case including inadmissibility factors.<sup>255</sup> When a victim or any of the victim’s family members applying for U visas has adverse factors in their background it is essential that they have an immigration attorney with U visa expertise representing them. The attorney will review adverse factors and develop the U visa victim’s application so as to mitigate the effect any adverse factors may have on the victim’s case. The goal will be to convince DHS adjudicators that they must balance any adverse factors against mitigating factors<sup>256</sup> including crime victimization related considerations presented in the victim’s case and decide to waive adverse factors by finding that granting the victim a waiver is in the public or national interest.<sup>257</sup>

### **Waitlist Adjudication, U Visa Approval, and Duration**

U visas approved for an immigrant victim and the victim’s family members who applied together with the victim have a 4-year duration. U visa victim can apply for an extension of their U visa status only if the immigrant’s presence in the United States is needed to assist in the investigation or prosecution of qualifying criminal activity.<sup>258</sup>

When a U visa victim applies for their family members at a later date than the victim filed their own application, the family members will receive U visas that have the same termination date as the U visa victim. Family members who file for U visas from overseas could have their U visas expire before they have been in the United States for the three years needed to qualify to apply for lawful permanent residence. When this occurs DHS regulations allow the U visa family member to file for a U visa extension.<sup>259</sup>

The HART Service Center is responsible for adjudicating bona fide determinations in U visa cases.<sup>260</sup> However, waitlist adjudications and the final adjudications that result in issuance

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<sup>254</sup> See VAWA Red Flags, NIWAP (July 16, 2015), <https://niwaplibrary.wcl.american.edu/pubs/vawa-red-flags> and Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases, NIWAP, (Dec. 26, 2022), <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>255</sup> For a full list of inadmissibility grounds see INA § 212; see also Comparing Inadmissibility Waivers Available to Immigrant Victims in VAWA Self-Petitioning, U Visa, T Visa and Special Immigrant Juvenile Status Cases (Dec. 26, 2022), <https://niwaplibrary.wcl.american.edu/pubs/inadmissibility-chart-vawa-t-u-sijs>.

<sup>256</sup> For a list of non-inclusive list of mitigating and aggravating factors see Memorandum from Alejandro N. Mayorkas, Sec’y, Dep’t Homeland Sec., Guidelines for the Enforcement of Civil Immigration Law, to Tae D. Johnson, Dir., U.S. Immigr. and Customs Enf’t, 3-4 (Sept. 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/mayorkas-civil-imm-guide-sept-21>.

<sup>257</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53021, 53022 (Sept. 17, 2007); 8 C.F.R. § 212(d)(14); 8 C.F.R. § 217(b)(1); 8 U.S.C. § 1182(d)(14).

<sup>258</sup> NEW CLASSIFICATION FOR VICTIMS OF CRIMINAL ACTIVITY; ELIGIBILITY FOR “U” NONIMMIGRANT STATUS; Interim Rule, 72 Fed. Reg. 53015, 53028, 53029 (Sept. 17, 2007); ; 8 C.F.R. § 214.14(g) (2008). The application for extension of status must be filed using DHS Form I-539.

<sup>259</sup> 8 C.F.R. § 214.14(g)(2)(i) (2008).

<sup>260</sup> USCIS, USCIS Opens the Humanitarian, Adjustment, Removing Conditions and Travel Documents (HART) Service Center (March 30, 2023),

of U visas are continuing to be adjudicated as of April 2023 by the Victims and Trafficking Unit at the Vermont and Nebraska Service Centers in the order that the U visa case filings were received.<sup>261</sup>

Only 10,000 U visas may be awarded each fiscal year. Once the cap of 10,000 per year is reached the Victims and Trafficking Unit at the Vermont and Nebraska Service Centers will continue to conduct waitlist adjudication of cases, but cannot issue U visas.<sup>262</sup> The waitlist adjudication is a full adjudication of all the elements of proof required for U visa eligibility and will include if needed issuance of requests for further evidence and notices of intent to deny to gather additional evidence needed to grant the U visa applicant waitlist placement.<sup>263</sup> Victims will be placed on waitlist in the order the cases were received. Though there are no caps for family members, DHS will not approve a family member's U visa applicant for the waitlist until the primary victim U visa petitioner's petition is waitlist approved.<sup>264</sup> Family members' U visa applications will be adjudicated based on the primary U visa victim's place in line.

U visa victims and their family members granted waitlist approval are issued deferred action and work authorization.<sup>265</sup> Work authorization and deferred action are granted for 4 years and are renewable until the victim reaches the place in line when they can be granted a U visa.<sup>266</sup> In order to be granted work authorization waitlist approved U visa applicants will need to file an application for work authorization using Form I-765.<sup>267</sup> It is best practice for U visa applicants to file their I-765 work authorization application together with their U visa application so that the application is already on file and the victim can be granted work authorization when they are granted deferred action either as part of a bona fide determination or waitlist approval.<sup>268</sup>

All Form I-765 work authorization requests filed concurrently with their U visa applicants seeking work authorization based on the U visa under 8 CFR 274a.12 (a)(19), will be converted automatically to applications for work authorization based on deferred action 8 CFR 274a.12(c)(14) when the U visa applicant is granted deferred action following either a bona fide determination or waitlist approval.<sup>269</sup> Applicants for work authorization based on deferred action are required to submit a fee to have their work authorization processed or must submit a fee waiver using Form I-912.

U visa applicants granted BFDs will need to file to renew their BDF based work authorization and deferred action every four years while the victim awaits the availability of a U

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<https://www.uscis.gov/sites/default/files/document/notices/USCISOpenstheHumanitarianAdjustmentRemovingConditionsandTravelDocumentsHARTServiceCenter.pdf>.

<sup>261</sup> 3 USCIS-PM C.6.

<sup>262</sup> 3 USCIS-PM C.6..

<sup>263</sup> 3 USCIS-PM C.6.

<sup>264</sup> 3 USCIS-PM C.6 (B).

<sup>265</sup> 8 CFR 274a.12(c)(14); *see also* 3 USCIS-PM C.6 (B).

<sup>266</sup> 3 USCIS-PM C.6 (B).

<sup>267</sup> 3 USCIS-PM C.6 (B).

<sup>268</sup> 3 USCIS-PM C.6 (B).

<sup>269</sup> 3 USCIS-PM C.6 (B).



visa.<sup>270</sup> Work authorization renewal requests will require submission of a new I-765 together with the required fee or a fee waiver request (Form I-192)<sup>271</sup>

### Documentary Evidence for U visa Applications

- ❑ “A Cover Letter: *“The letter should explain how the applicant meets the requirements for the U visa. The letter should provide a roadmap to the exhibits filed in support of each U visa requirement. The cover letter should also provide identification information, including applicant’s full name and date and place of birth. If the applicant’s spouse, child, or, parent, will also be seeking U visas, the cover letter should state this and should list information such as the family members’ names, dates of birth, and relationship to the U visa victim applicant.*
- ❑ Signed statement from the applicant: *A detailed declaration should describe the criminal activity and how the applicant meets each U visa requirement.*
- ❑ The Applicant’s Personal Identification Information
- ❑ Form I-918 *Application for U Nonimmigrant Status*
- ❑ Form I-918 Supplement B *U Nonimmigrant Status Certification*
- ❑ Additional evidence to support each U visa requirement.
- ❑ Form I-918 Supplement A *Petition for Qualifying Family Member of a U-I Recipient* for each family member included with the victim’s application. (The victim may add applications for family members at a later date)
- ❑ Form I-765 *Application for Work Authorization* is not required for the U visa victim applicant but is required for all family members who want employment authorization.
- ❑ Form I-192 *Application for Advance Permission to Enter as a Non-Immigrant*, if the applicant is inadmissible, with accompanying fee or fee waiver request.<sup>272</sup>
- ❑ A copy of the applicant’s passport or Form I-193 *Application for Waiver for Passport and/or Visa* with accompanying fee or fee waiver request.
- ❑ Biometrics (fingerprinting) fee or fee waiver request
- ❑ Fees: There are no filing fees associated with filing a U visa (Form I-918). All fees associated with a U visa application from filing through receipt of lawful permanent residency are by statute required to be waivable for U visa applicants.<sup>273</sup>

The following is a list of suggested documents that may be submitted to prove each element of a U visa case. This list is meant to serve as a guide, and additional types of evidence may also be submitted in support of the application. Not all documents listed below will be available in every case.

In addition to a signed U visa application, the victim’s affidavit and the signed certification from a federal, state or local government official, an application for U non-immigrant status may include evidence of each of the following, if available:

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<sup>270</sup> 3 USCIS-PM C.5 (C)(6).

<sup>271</sup> 3 USCIS-PM C.5 (C)(6).

<sup>272</sup> The TVPRA 2008, Section 201(d), for which there is currently no rule, assures permanent access to fee waivers of all costs and fees associate with filing an application through final adjudication of the adjustment of status in VAWA self-petition, T-visa, U visa, VAWA cancellation of removal, and VAWA suspension of deportation cases and for the cases of nonimmigrant derivative victims of domestic violence.

<sup>273</sup> 8 C.F.R. § 103.7(c)(5)(i) (2008).

**Evidence of Substantial Physical and Mental Abuse as a Result of the Criminal Activity:**

- ❑ Records from a health care provider documenting the diagnosis and treatment of physical injuries or a psychological condition resulting from the criminal activity
- ❑ Affidavits from victim advocates, shelter workers, counselors, or mental health professionals, detailing any physical and mental abuse or harm that the applicant has experienced and the effect that the abuse has had on the applicant, the applicant’s children, and the applicant’s family
- ❑ Affidavit of the applicant detailing the substantial physical and mental abuse or harm suffered as a result of the criminal activity
- ❑ Copies of any police/ incident reports on domestic violence, sexual assault, trafficking or listed other criminal activity
- ❑ Copies of any protection orders/ restraining orders against the perpetrator
- ❑ Copies of any family, criminal or other court findings or rulings documenting the criminal activity
- ❑ Affidavits and certifications from neighbors, landlords, friends, or family who witnessed the criminal activity or the resulting harm or injuries.
- ❑ Affidavits from police officers or prosecutors describing the violence or abuse that the applicant has experienced
- ❑ Photographs showing injuries and any other damage from the criminal activity (*e.g.*, torn clothing, broken door, etc.)
- ❑ Records of any 911 calls

**Evidence that the Victim Possesses Information Concerning the Criminal Activity:**

- ❑ Affidavits and certifications from police officers, prosecutors, EEOC investigators, judges, child abuse investigators, adult protective services investigators, Department of Labor investigators detailing the applicant’s knowledge of the criminal activity
- ❑ Copies of any police reports or statements that the applicant has made to a law enforcement agency
- ❑ Copies of claims for Victims of Crime Act (“VOCA”) assistance filed as a result of the criminal activity

- Copies of reports filed with state child abuse investigators
- Copies of reports filed by state adult protective services investigators
- Transcripts of testimony that the applicant has given to a state, local, or federal law enforcement agency or court
- Affidavits from witnesses that may place the applicant at the scene of the criminal activity or attest to the applicant’s knowledge of the criminal activity
- Copies of medical records documenting physical injuries occurring as the result of the criminal activity
- Copies of reports made to sexual assault health professionals and law enforcement with regard to evidence collection in rape cases

**Evidence That the Crime Victim Has Been Helpful, Is Helpful, or Is Likely to Be Helpful to a Federal, State, or Local Investigation or Prosecution:**

- Copies of any police reports, statements or complaints that the applicant made to law enforcement officials (these can be at the time of the incident or statements taken by police at a later date)
- Certifications and affidavits from police officers and prosecutors detailing the applicant’s helpfulness
- Copies of reports filed with state child abuse investigators
- Transcripts of testimony that the applicant has given to a state, local, or federal law enforcement agency or court
- Copies of reports made to law enforcement with regard to evidence collection in rape cases

**Evidence That Criminal Activity Violated the Laws of the United States or Occurred in the United States or its Territories:**

- Copies of any police reports or statements that the applicant has made to a law enforcement agency, particularly those citing criminal code sections violated
- Copies of claims for Victims of Crime Act (“VOCA”) assistance filed as a result of the criminal activity
- Copies of reports filed with state child abuse investigators

- Copies of reports filed by adult protective services investigators
- Transcripts of testimony that the applicant has given to a law enforcement agency
- Copies of any arrest warrants, police reports, or domestic violence incident report
- Copies of records from a hospital or health care professional in the United States close in time to the occurrence of the criminal activity

### **U visa Holder's Applications for Lawful Permanent Residency<sup>274</sup>**

To be eligible to attain lawful permanent residency, a U visa holder and any family member granted a U visa applicant must:

- Have been lawfully admitted to the United States as a U visa holder;<sup>275</sup>
- Have current U visa status;<sup>276</sup>
- Have had 3 years continuous physical presence in the U.S. since the date of admission as a U visa holder (exempting any individual absence of 90 days or less or an aggregate of 180 days or less);<sup>277</sup>
- Not be inadmissible as a perpetrator of Nazi persecution, genocide, or an act of torture or extra-judicial killing (INA 212(a)(3)(E));
- Since being granted a U visa has not unreasonably refused to provide assistance to an official investigating the qualifying criminal activity; and
- Establish that their presence in the United States is justified:<sup>278</sup>
  - on humanitarian grounds;
  - to ensure family unity; or
  - is in the public interest.
- Offer evidence to support a favorable factors demonstrating why DHS should exercise its discretion to grant the applicant lawful permanent residency<sup>279</sup>

U visa holder victims and their U visa holder family members who have been physically present in the United States for three years are eligible to apply for lawful permanent

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<sup>274</sup> This section on lawful permanent residency for U visa holders was derived from the National Network to End Violence Against Immigrant Women, "Summary of U Adjustment Regulations" (2009), <https://niwaplibrary.wcl.american.edu/pubs/summary-u-adjust-reg>.

<sup>275</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75540, 75546 (2008).

<sup>276</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75540, 75546 (2008).

<sup>277</sup> 8 C.F.R. § 245.24(a)(1) (2008); *see* INA § 245(m)(2); 8 U.S.C. 1255(m)(2); ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75546 (2008).

<sup>278</sup> INA § 254(m); 8 C.F.R. § 245.24(d) (2008).

<sup>279</sup> 8 C.F.R. § 245.24(d)(11) (2008); ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (2008).

residency.<sup>280</sup> U visa lawful permanent residency applications are adjudicated by the DHS Victims and Trafficking Unit at the Nebraska Service Center<sup>281</sup> in the order that the applications are received.<sup>282</sup> There is no cap on the total number lawful permanency applications that can be granted to U visa victims and eligible family members in any year.<sup>283</sup> DHS is the sole agency authorized to grant lawful permanent residency to U visa victims.<sup>284</sup> Crime and trafficking victims in the Commonwealth of the Northern Mariana Islands who hold T or U visas are eligible for lawful permanent residency, even if they held the T or U visas and began “accruing time” before November 2009.<sup>285</sup>

Once the U visa applicant’s lawful permanent residence application has been adjudicated, DHS will issue a written notice of approval. The notice will instruct the applicant on how to obtain temporary lawful permanent residency documentation.<sup>286</sup> The U visa victim’s date of admission to the United States will be the date the victim’s application for lawful permanent residency was approved by DHS.<sup>287</sup> Applicants must complete a form from which DHS will produce a green card (Form I-89).<sup>288</sup>

If the U visa victim’s application for lawful permanent residency is denied, the victim may file an appeal with the DHS Administrative Appeals Office.<sup>289</sup> The denial by a U visa holder’s application for lawful permanent residency cannot be renewed or filed before the immigration judge in removal proceedings since immigration judges cannot grant lawful permanent residency for U visa victims.<sup>290</sup> Should a victim’s appeal be denied by the Administrative Appeals Office, the victim is not precluded from filing a new U visa application that is well documented and more fully addresses any issues raised in the victim’s previous U visa case.

### **Admission and Current Status as a U visa Holder**

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<sup>280</sup> 8 C.F.R. § 245.24(b)(3) (2008); *see* INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A) (2008). ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75546 (2008).

<sup>281</sup> As of April 12, 2023, USCIS is no longer accepting U-visa based Form-1485, Application to Register Permanent Residency or Adjust Status, at the Vermont Service Center. All U visa based adjustment of status forms must be sent to the Nebraska Services Center.

<sup>282</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75555 (2008).

<sup>283</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75555 (2008).

<sup>284</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (2008). Immigration judges do not have legal authority rule on lawful permanent residency for U visa victims.

<sup>285</sup> *See* VAWA § 809 and § 705(c) of the Consolidated Natural Resources Act of 2008 (Public Law 110-229; 48 U.S.C. 1806 note).

<sup>286</sup> *See* VAWA § 809; § 705(c) of the Consolidated Natural Resources Act of 2008 (Public Law 110-229; 48 U.S.C. 1806 note); 8 C.F.R. § 245.24(f) (2008).

<sup>287</sup> 8 C.F.R. § 245.24(f)(1) (2008); *see* INA § 245(m)(4), 8 U.S.C. 1255(m)(4).

<sup>288</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (2008).

<sup>289</sup> 8 C.F.R. § 245.24(f)(2) (2008).

<sup>290</sup> 8 C.F.R. § 245.24(k) (2008).

Immigration and Nationality Act Section 245(m) provides that crime victims lawfully admitted to the United States as U visa holders must apply for lawful permanent residency while they are still in U visa status.<sup>291</sup> U visas are granted for up to four years. After three years, U visa holders are eligible to apply for lawful permanent residency.<sup>292</sup> Victims with U interim relief approved for U visas will be granted U visa status retroactive to the date on which the U visa holder was originally granted U interim relief.<sup>293</sup> Those who timely apply for lawful permanent residency retain U visa status until DHS adjudicates their application for lawful permanent residence.<sup>294</sup> Applicants whose U visas have been revoked are not eligible to apply for lawful permanent residence as U visa holders.<sup>295</sup>

### **Continuous Physical Presence for 3 Years**

Applicants for lawful permanent residence must have maintained and must establish continuous physical presence in the United States for at least three-years. To show this, the U visa holder should demonstrate:

- That they have remained in the United States from the time they received U interim relief and their U visa through the time of application for lawful permanent residency;<sup>296</sup> or
- That they did not travel outside of the United States for a single period of 90 days or more than for an aggregate period of 180 days or more;<sup>297</sup> or
- That any absence in excess of the 90 or 180-day maximums was necessary for the purposes of assisting in an investigation or prosecution of the qualifying criminal activity or if an official involved with investigation or prosecution certifies that the absence was otherwise justified.<sup>298</sup>

The applicant must submit an affidavit attesting to their continuous physical presence along with any other evidence which shows the requisite continuous time period has been met. Documents submitted to prove continuous presence should be sufficiently detailed to establish continuity of presence for three years. Proof of presence on every single day is not required.<sup>299</sup> However, there should be no significant chronological gaps in documentation.<sup>300</sup>

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<sup>291</sup> 8 C.F.R. § 245.24(b)(2) (2008); ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75546 (2008).

<sup>292</sup> 8 C.F.R. § 245.24(b)(3) (2008); *see* INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A).

<sup>293</sup> 8 C.F.R. § 245.24(b)(2)(ii) (2008) creates a transition rule for U visa victims who had received U interim relief for more than three years prior to January 12, 2009 may combine their physically presence in the United States during both U interim relief with U visa status and immediately apply for lawful permanent residency. INA § 214(p)(6). However, victims who initially had U interim relief are required to first file for a U visa and then once approved file for lawful permanent residency. The deadline set in the regulations for victims with U interim relief to file for U visas has passed.

<sup>294</sup> INA § 245(l)(1)(A); 8 U.S.C. § 1255(l)(1)(A).

<sup>295</sup> 8 C.F.R. § 245.24(c) (2008).

<sup>296</sup> 8 C.F.R. § 245.24(b)(3) (2008); *see* INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A).

<sup>297</sup> 8 C.F.R. § 245.24(a)(1) (2008); *see* INA § 245(m)(2); 8 U.S.C. 1255(m)(2). Absences of less than 90 or 180 days will not be deducted when counting 3 years continuous presence. Absences more than 90 or 180 days will be deducted.

<sup>298</sup> 8 C.F.R. § 245.24(a)(1) (2008); *see* INA § 245(m)(2); 8 U.S.C. 1255(m)(2).

<sup>299</sup> 73 Fed. Reg. 75548 (Dec. 12, 2008).

<sup>300</sup> 73 Fed. Reg. 75548 (Dec. 12, 2008).

All government-issued documents submitted should include a seal or other authenticating instrument if such a seal or indicia would normally be on the agency's documents.<sup>301</sup> In addition to documents from official government agencies, the petitioner may also submit non-governmental documents including college transcripts, employment records, state or federal tax returns, showing school attendance or employment, or installment period documents like rent receipts, bank statements, or utility bills covering the full 3 year period.<sup>302</sup> If these types of documents are not available, the applicant should submit any credible evidence proving continuous presence, including supporting affidavits from others who can attest to the applicant's continuous physical presence.<sup>303</sup>

Documents that are already in the applicant's DHS file do not need to be resubmitted. However, the lawful permanent residency application should describe each document in the DHS file upon which the victim is relying as evidence supporting their application. A list describing each document by type and date of the document should be included.<sup>304</sup> These documents could include the written copy of a sworn statement to a DHS officer, law enforcement agency documents, hearing transcripts, or other evidence originally submitted as part of the U visa application.<sup>305</sup> Evidence of continuous presence must also include a copy of the victim's passport and/or alternative travel documents showing entries into and departures from the United States.<sup>306</sup> When the victim has left and reentered the United States, a signed statement by the applicant as the only evidence submitted will not be sufficient proof.<sup>307</sup>

### **Convincing DHS to Exercise Discretion in Favor of Granting U visa Holder Lawful Permanent Residence**

U visa holders applying for lawful permanent residency must prove that they are not inadmissible under 212(a)(3)(E) as Nazis, or perpetrators of genocide, torture, or extrajudicial killing.<sup>308</sup> Although U visa holders seeking lawful permanent residency are not required to establish admissibility,<sup>309</sup> in deciding whether to exercise discretion to grant lawful permanent residency to an immigrant crime victim, DHS weighs favorable and adverse factors in the victim's case.<sup>310</sup> The victim has the burden of showing that discretion should be exercised in their favor.<sup>311</sup> Any inadmissibility factors present in the victim's case that arose after the victim became a U visa holder are likely to be considered by DHS in adjudicating the victims

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<sup>301</sup> See generally 8 C.F.R. § 245.22 (2008).

<sup>302</sup> 8 C.F.R. § 245.22 (2008).

<sup>303</sup> 8 C.F.R. §§ 245(d)(5), (6) (2008).

<sup>304</sup> 73 Fed. Reg. 75548 (Dec. 12, 2008).

<sup>305</sup> 73 Fed. Reg. 75548 (Dec. 12, 2008).

<sup>306</sup> 8 C.F.R. §§ 245.24(d)(5), (6) (2008).

<sup>307</sup> 8 C.F.R. §§ 245.24(d)(5), (6) (2008). See also ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (2008).

<sup>308</sup> INA § 212(a)(3)(E), 8 U.S.C. 1182(a)(3)(E); INA § 245(m)(1), 8 U.S.C. 1255(m)(1).

<sup>309</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (2008).

<sup>310</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (2008).

<sup>311</sup> 8 C.F.R. § 245.24(d)(11) (2008).

application for lawful permanent residency.<sup>312</sup> However, inadmissibility factors that DHS waived in awarding the victim a U visa cannot be re-adjudicated in the victim’s application for lawful permanent residency and should also not be considered by DHS in their exercise of discretion.<sup>313</sup>

To prove that DHS should exercise its discretion to grant lawful permanent residency to a U visa holder the applicant may provide any credible evidence. There is no set number or type of documents that can be presented. Evidence of family ties, hardship, and length of residence in the United States are factors which could weigh decisively in favor of DHS making a discretionary grant of lawful permanent residency.<sup>314</sup>

Adverse factors, such as those that would otherwise render the applicant inadmissible, may be considered in DHS’s discretion. For a U visa holder to overcome the prejudicial weight of these adverse factors, they must offset adverse factors with mitigating factors. The victim may be required to show clearly that denial of the adjustment would result in exceptional and extremely unusual hardship.<sup>315</sup> These mitigating factors may not be sufficient, absent the “most compelling positive factors,”<sup>316</sup> to offset adverse factors if the applicant has committed or been convicted of a serious violent crime, a crime involving sexual abuse of a child, multiple drug-related crimes, or where there are security or terrorism related concerns.<sup>317</sup>

On September 30, 2021 DHS Secretary Alejandro Mayorkas issued a memorandum that provide a non-exclusive useful list of aggravating and mitigating factors:<sup>318</sup>

“Whether a noncitizen poses a current threat to public safety is not to be determined according to bright lines or categories. It instead requires an assessment of the individual and the totality of the facts and circumstances.

There can be aggravating factors that militate in favor of enforcement action. Such factors can include, for example:

- The gravity of the offense of conviction and the sentence imposed;
- The nature and degree of harm caused by the criminal offense;
- The sophistication of the criminal offense;
- Use or threatened use of a firearm or dangerous weapon;
- A serious prior criminal record.

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<sup>312</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (Dec. 1, 2008). For more on inadmissibility grounds *see* the chapter “Human Trafficking and the T Visa” at 21-22 in this manual.

<sup>313</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (Dec. 1, 2008).

<sup>314</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (Dec. 1, 2008).

<sup>315</sup> 8 C.F.R. § 245.24(d)(11) (2008). (The application for lawful permanent residency is called “adjustment of status” under immigration law)

<sup>316</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549 (Dec. 1, 2008).

<sup>317</sup> 8 C.F.R. § 245.24(d)(11) (2008).

<sup>318</sup> Alejandro N. Mayorkas, Guidelines for the Enforcement of Civil Immigration Law, DHS Secretary to Tae D. Johnson re: Civil Immigration Enforcement Priorities, 3-4 (Sept. 30, 2021) <https://niwaplibrary.wcl.american.edu/pubs/mayorkas-civil-imm-guide-sept-21>.



Conversely, mitigating factors that militate in favor of declining enforcement action can include, for example:

- Advanced or tender age;
- Lengthy presence in the United States;
- A mental condition that may have contributed to the criminal conduct, or a physical or mental condition requiring care or treatment;
- Status as a victim of crime or victim, witness, or party in legal proceedings; • the impact of removal on family in the United States, such as loss of provider or caregiver;
- Whether the noncitizen may be eligible for humanitarian protection or other immigration relief;
- Military or other public service of the noncitizen or their immediate family; • time since an offense and evidence of rehabilitation;
- Conviction was vacated or expunged.

The above examples of aggravating and mitigating factors are not exhaustive. The circumstances under which an offense was committed could, for example, be an aggravating or mitigating factor depending on the facts. The broader public interest is also material in determining whether to take enforcement action. For example, a categorical determination that a domestic violence offense compels apprehension and removal could make victims of domestic violence more reluctant to report the offense conduct. The specific facts of a case should be determinative.”

### **Proving That the Applicant has not Unreasonably Refused to Assist in Investigation or Prosecution**

Victims granted U visas have an ongoing obligation not to unreasonably refuse to provide assistance in the investigation or prosecution of qualifying criminal activity.<sup>319</sup> Both the victim and any family members<sup>320</sup> who receive U visas who apply for lawful permanent residency should<sup>321</sup> provide proof including:

- Whether they were asked to offer assistance, by whom; and
- how they responded;<sup>322</sup> and

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<sup>319</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008).

<sup>320</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008). (If a family member with a U visa possesses information about at the underlying criminal activity AND was asked to assist in the investigation or prosecution the family member with the U visa has a responsibility to not unreasonably refuse to provide assistance).

<sup>321</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008). (“The applicant is not required to establish the reasonableness of any refusals to comply with such requests for assistance, as it is a matter for the [DHS] Attorney General to determine whether any refusal was unreasonable.”) *See* INA § 245(m)(5) (Establishing that DHS makes the determination of reasonableness and may do so in cases involving federal prosecutors in consultation with the U.S. Department of Justice).

<sup>322</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008). 8 C.F.R. §§ 245.24(d)(8), 245.24(e) (2008).

- That they offered assistance; or
- Evidence explaining that their refusal to offer assistance was not unreasonable.
- Evidence on their efforts to offer assistance may also be submitted.

DHS regulations define “refusal to provide assistance” as refusal to provide assistance *after* the victim was granted U visa status.<sup>323</sup> The determination of whether a victim’s refusal to provide was unreasonable is a DHS decision.<sup>324</sup> The DHS regulations provide U visa holders with an option of submitting a document signed by a government official that had responsibility for the investigation or prosecution of criminal activity. The document should affirm that the victim complied with requests for assistance or did not unreasonably refuse to comply with reasonable requests for assistance.<sup>325</sup> This need not be the same official who signed the U visa certification. Alternatively, applicants for lawful permanent residency may prove assistance by submitting a newly executed U visa certification containing additional information about the assistance offered by the victim.<sup>326</sup>

DHS will consider the totality of the circumstances.<sup>327</sup> Factors<sup>328</sup> that may be considered in this determination are:<sup>329</sup>

- General law enforcement, prosecutorial and judicial practices;
- The kinds of assistance asked of victims of other crimes involving force, coercion, or fraud;
- The type of request for assistance and how the request for the assistance may have been made;
- The nature of the applicant’s victimization;
- Preexisting guidelines for victim and witness assistance;
- Circumstances specific to the applicant such as:
  - Fear;
  - Safety of the victim and the victim’s family members;
  - Severe physical and/or mental trauma;
  - The applicant’s age; or
  - The applicant’s maturity.

A determination that an applicant unreasonably refused to provide assistance may only be made by DHS based on affirmative evidence in the record suggesting that a U visa recipient “*may have* unreasonably refused to provide assistance to the investigation or prosecution of

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<sup>323</sup> 8 C.F.R. § 245.24(a)(5).

<sup>324</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008).

<sup>325</sup> 8 C.F.R. § 245.24(e)(1) (2008).

<sup>326</sup> 8 C.F.R. § 245.24(e)(3) (2008).

<sup>327</sup> 8 C.F.R. § 245.24(a)(5) (2008).

<sup>328</sup> A list of evidence that could be submitted to prove that the U visa victim did not unreasonably refuse to comply with requests for assistance is included later in this chapter.

<sup>329</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008).

persons in connection with the qualifying criminal activity.”<sup>330</sup> Evidence of that a victim’s refusal to assist with an investigation or prosecution was unreasonable may be provided by the U visa certifying official to DHS. Under the regulations, DHS is authorized to seek such information from federal or state law enforcement or prosecutorial entities.<sup>331</sup>

### **Documentary Evidence for U visa Holders Applying for Lawful Permanent Residency**

Applications for lawful permanent residency filed by U visa holders and U visa eligible family members are to be submitted to the Victims and Trafficking Unit of the DHS Vermont or Nebraska Service Center. The Victims and Trafficking Unit adjudicates lawful permanent residency applications for U visa holders.<sup>332</sup>

Documents required for U visa Lawful Permanent Residency Applications <sup>333</sup> include:

- Form I-485, Application to Register Permanent Residence or Adjust Status;
- Form I-485 Supplement E which is essentially additional instructions for U visa holders;
- Form I-485 filing fee or a fee waiver request;<sup>334</sup>
- Biometric services fee or a fee waiver request;
- Photocopy of the applicant’s U visa approval notice;
- Photocopy of all pages of all the applicant’s passports valid from the time the U visa holder received U interim<sup>335</sup> relief and/or a U visa for the required three-year period<sup>336</sup> and documentation showing the following:
  - The date of any departure from the United States during the period that the applicant was in U visa status;
  - The date, manner, and place of each return to the United States during the period that the applicant was in U visa status; and
  - If the applicant has been absent from the United States for any period in excess of 90 days or for any periods in the aggregate of 180 days or more, a certification from the investigating or prosecuting agency that the absences were necessary to

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<sup>330</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75548 (Dec. 1, 2008). (Such evidence may have been submitted to DHS by the federal or state government official.)

<sup>331</sup> 8 C.F.R. § 245.24(e)(3) (2008); ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS 73 Fed. Register 75547 (Dec. 1, 2008). The U visa certification form provides information to U visa certifiers regarding how to communicate with and provide information to DHS the official determines that a U visa recipient’s refusal to assist with a request from the official was unreasonable.

<sup>332</sup> The Victims and Trafficking Unit has the authority to request that the U visa victim applying for lawful permanent residency be interviewed at a local DHS District Office, however, as of Dec. 2010 this has not been a frequent or regular procedure.

<sup>333</sup> 8 C.F.R. § 245.24(d) (2008).

<sup>334</sup> 8 C.F.R. § 103.7(c)(5)(ii) (2008).

<sup>335</sup> 8 C.F.R. § 245.24(b)(2)(ii) (2008) created a transition rule for U visa victims who had received U interim relief for more than three years prior to January 12, 2009. U visa victims may combine their physical presence in the United States during both U interim relief with U visa status and immediately apply for lawful permanent residency. INA § 214(p)(6). However, victims who initially had U interim relief are required to first file for a U visa and then once approved file for lawful permanent residency. The deadline set in the regulations for victims with U interim relief to file for U visas has passed.

<sup>336</sup> The applicant may alternately provide an equivalent travel document or a valid explanation of why the applicant does not have a passport.

assist in the investigation or prosecution of the criminal activity or were otherwise justified.

- Applicants who do not have passports are required to provide a valid explanation of why the applicant does not have a passport.<sup>337</sup>
- Copy of the applicant’s Form I-94, Arrival-Departure Record;
- Evidence that the applicant was lawfully admitted in U visa status and continues to hold such status at the time of the application;
- Evidence pertaining to any request made to the applicant by an official or law enforcement agency for assistance in the criminal investigation or prosecution, and the applicant’s response to such request;
- Evidence, including an affidavit from the applicant that they have continuous physical presence the full period of at least three years.
  - This should include a signed statement from the applicant attesting to continuous physical presence—although that alone generally may not be sufficient to meet this eligibility requirement;
  - Documentation of continuous presence including:
    - college transcripts,
    - employment records,
    - state or federal tax returns,
    - documents showing school attendance,
    - documents showing employment,
    - installment period documents like rent receipts, bank statements, or utility bills. covering the full three-year period,
    - Affidavits of persons with first-hand knowledge who can attest to the applicant’s continuous physical presence supported in the affidavit by specific facts.
- Evidence establishing that approval of lawful permanent residency by DHS is warranted as a matter of discretion:
  - Evidence of favorable factors
  - Evidence of mitigation of adverse
- Evidence that the U visa holder qualifies for lawful permanent residency on one or more of the following grounds:
  - Humanitarian need;
  - Family unity;
  - Public interest.
- NOTE: Form I-601 “Application for Waiver of Inadmissibility Grounds” will *not* be submitted. This is because the only applicable inadmissibility ground, the INA 212(a)(3)(E),<sup>338</sup> cannot be waived.

**Documentation that the Victim did not Unreasonably Refuse to Provide Assistance in the**

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<sup>337</sup> 8 C.F.R. § 245.24(d)(5)(2008).

<sup>338</sup> INA § 212(a)(3)(E) (Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing),

## Investigation or Prosecution<sup>339</sup>

U visa holders may submit evidence of cooperation or that the victim did not unreasonably refuse to provide assistance in the investigation or prosecution the qualifying criminal activity in one of the following two ways:

- *Option One:* Submit a document signed by an official or law enforcement agency that had responsibility in connection with the investigation or prosecution of the qualifying criminal activity.<sup>340</sup> The document should affirm that the applicant complied with and did not unreasonably refuse to comply with reasonable requests for assistance in the investigation or prosecution during the requisite period.<sup>341</sup> This may be done by:
  - Submitting a statement from a government official involved in the investigation or prosecution of qualifying criminal activity; or
  - Submitting a newly executed U visa certification Form I-918, Supplement B, “U Nonimmigrant Status Certification.”<sup>342</sup>
  
- *Option Two:* Since in some cases it may be difficult for an applicant to obtain the newly executed U visa certification on Form I-918, the regulations allow the applicant to instead submit an affidavit describing:
  - the applicant’s efforts to obtain a newly executed U visa certification Form I-918 Supp. B;
  - Evidence about requests for assistance that the victim received may include:<sup>343</sup>
    - What assistance was requested?
    - Who requested the assistance (*e.g.*, name, agency, title)
    - When the request was made (before or after the victim had a U visa)
    - Details of how and when the request was made.
    - The victim’s response to the request(s)
  - Applicants should also include, when possible:
    - Identifying information about the law enforcement personnel involved in the case
    - Any information of which the applicant is aware about the status of the criminal investigation or prosecution,
    - Information about the outcome of any criminal proceedings, or
    - Whether the investigation or prosecution was dropped and the reasons.<sup>344</sup>
  - Depending on the circumstances, evidence might include:
    - Court documents

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<sup>339</sup> The TVPRA 2008, Section 201(e), shifted adjudicatory authority from the Department of Justice (DOJ) to the Department of Homeland Security (DHS) for all U visa related adjudications including applications for lawful permanent residency. DHS shall consult with DOJ as appropriate regarding affirmative evidence demonstrating that a victim unreasonably refused to cooperate in a Federal investigation or prosecution.

<sup>340</sup> 8 C.F.R. § 245.24(e)(1) (2008).

<sup>341</sup> 8 C.F.R. § 245.24(e)(1) (2008).

<sup>342</sup> 8 C.F.R. § 245.24(e)(2) (2008).

<sup>343</sup> 8 C.F.R. §§ 245.24(d)(8), 245.24(e) (2008). *See generally* ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008).

<sup>344</sup> 8 C.F.R. §§ 245.24(d)(8), 245.24(e) (2008). *See generally* ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75547 (Dec. 1, 2008).

- Police reports
- News articles
- Copies of reimbursement forms for travel to and from court, or
- Affidavits of other witnesses or officials<sup>345</sup>

### **Petitioning for Family Members to Attain Lawful Permanent Residency who did not have U visas<sup>346</sup>**

A U visa holder may file an application for lawful permanent residency on behalf of the U visa victim's family member who did not previously apply for or receive a U visa. Qualifying family members' applications for lawful permanent residency may be submitted along with the victim's application for lawful permanent residency.<sup>347</sup>

To qualify for lawful permanent residency the family member must meet the following criteria:

- The family member was never awarded U visa status and never held a U visa;
- A qualifying family relationship exists at the time that the U visa victim was granted lawful permanent residency. That a family relationship continues to exist through the adjudication of the qualifying family member's application for and the issuance of lawful permanent residency to the family member. Relationships include:
  - The adult U visa victim's spouse and children (under 21);<sup>348</sup>
  - Victims under the age of 21 their spouse, children, parents and unmarried siblings (under age 18);<sup>349</sup>
  - A U visa victim's children born after the application is approved.<sup>350</sup>
  - Perpetrators of battery or extreme cruelty or human trafficking who are family members of the U visa victims are not qualifying family members.
- Extreme hardship would result for either the U visa holder or the qualifying family member if the family member is not allowed to remain in or join their family member in the United States; and

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<sup>345</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75540, 75547 (De

c. 12, 2008).

<sup>346</sup> INA § 245(m); 8 U.S.C. 1255(m).

<sup>347</sup> 8 C.F.R. § 245.23(b)(1) (2008). Family members' applications for lawful permanent residency may not be filed before the T visa victim's application has been filed.

<sup>348</sup> INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

<sup>349</sup> INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

<sup>350</sup> 8 C.F.R. § 214.14(f)(4)(i) (2008).

- The U visa victim has:<sup>351</sup>
  - Been granted lawful permanent residency;
  - Has a pending application for lawful permanent residency; or
  - Is concurrently filing an application for lawful permanent residency.

Qualifying family members of U visa victims must file an application for an immigrant visa on DHS Form I-929 Petition for Qualifying Family Member of a U-1 Nonimmigrant. If the family members are, at the time of filing, outside the United States, they will be eligible to obtain an immigrant visa from a U.S. Consulate abroad.<sup>352</sup> The family member must include the filing fee<sup>353</sup> or request a fee waiver<sup>354</sup> for the visa and for all costs or fees associated with the family member's application for lawful permanent residency. Filing for lawful permanent residency for qualifying family members who did not receive U visas is a two-step process:

### Step One:

The victim who is a U visa holder files an immigration petition on behalf of the qualifying family member.<sup>355</sup> The victim files Form I-929, with a fee, or a fee waiver request<sup>356</sup> at the Victims and Trafficking Unit of the DHS Nebraska Service Center. The application should include evidence establishing the U visa holder's relationship to the family member.<sup>357</sup>

- Preferred evidence of the family relationship includes:
  - Birth certificates; or
  - Marriage certificates
- Secondary evidence may be submitted where primary evidence is not available.<sup>358</sup>
- The applicant may prove the relationship by providing any other credible evidence.

The Form I-929 for a family member may be filed concurrently with the U visa holder's application for lawful permanent residency or may be filed later after the U visa holder has been granted lawful permanent residency. The family members' application will not be approved until the U visa holder's application for lawful permanent residency is adjudicated.

In determining whether the extreme hardship requirement has been satisfied, the burden is on the applicant to provide sufficient supporting evidence that the qualifying family member or the U visa holder would suffer extreme hardship should the family member not be allowed to remain in the U.S.<sup>359</sup> Applications are reviewed on a case-by-case basis, and USCIS will consider all credible evidence and adjudicate as a matter of discretion. If the immigrant visa

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<sup>351</sup> 8 C.F.R. § 245.24(g) (2008).

<sup>352</sup> INA § 245(m)(3); 8 U.S.C. § 1255(m)(3).

<sup>353</sup> 8 C.F.R. § 103.7(b)(1) (2008).

<sup>354</sup> 8 C.F.R. § 103.7(c)(5)(i) (2008).

<sup>355</sup> 8 C.F.R. § 245.24(h) (2008).

<sup>356</sup> 8 C.F.R. §§ 245.24(h)(1)(ii), (i)(iii), (iv) (2008).

<sup>357</sup> 8 C.F.R. § 245.24(h)(1)(iii) (2008).

<sup>358</sup> 8 C.F.R. § 103.3(b)(2) (2008).

<sup>359</sup> 8 C.F.R. § 245.24(h)(1)(iv) (2008). For examples of the types of evidence that can be used to prove extreme hardship in cases involving immigrant crime victims *see* Chapter 11 Human Trafficking and the T visa and Chapter 9 VAWA Cancellation of Removal in this manual.

petition (I-929) for any family member is denied, DHS will notify the applicant in writing. The denial can be appealed to the Administrative Appeals Office.<sup>360</sup>

### **Step Two:**

Once the family member's visa petition (I-929) is approved, the family member who is in the United States will file their application for lawful permanent residency at the Victims and Trafficking Unit of the Vermont or Nebraska Service Center where their application for lawful permanent residency will be adjudicated. Once a family member in the United States has filed their application for lawful permanent residency (Form I-485) the applicant will be eligible for work authorization.<sup>361</sup>

Family members residing abroad whose I-929 visa petitions are approved will need to go to the U.S. consulate or embassy to receive their immigrant visa.<sup>362</sup> DHS will forward the approval notice to the National Visa Center for consular processing or to a Port Of Entry.<sup>363</sup> Family members outside of the United States will be required to show admissibility to be granted entry into the United States.<sup>364</sup>

### **Documentation for Family Member's Immigrant Visa Applications<sup>365</sup>**

- Form I-929, Petition for Qualifying Family Member of a U-1 Nonimmigrant;
- I-929 filing fee or fee waiver request;
- Evidence of the relationship, such as birth or marriage certificate. If primary evidence is unavailable, secondary evidence or affidavits may be submitted;
- Evidence establishing that either the qualifying family member or the U visa holder would suffer extreme hardship if the qualifying family member is not allowed to remain in or join the U visa holder in United States.

### **Documentation for Family Member's Application for Lawful Permanent Residency**

- Form I-485, Application to Register Permanent Residence or Adjust Status;
- Form I-485 filing fee or a fee waiver request;<sup>366</sup>
- Biometric services fee or a fee waiver request;
- Evidence of admissibility for family members living abroad.

### **Limitations on Travelling Outside of the United States on a U visa**

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<sup>360</sup> 8 C.F.R. § 245.24(h) (2)(ii) (2008).

<sup>361</sup> 8 C.F.R. § 274a.12(c)(9) (2008).

<sup>362</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75549-50 (Dec. 1, 2008).

<sup>363</sup> 8 C.F.R. § 245.24(h)(2)(i)(A) (2008).

<sup>364</sup> INA § 212(a). For further information about admissibility see the discussion of admissibility earlier in this chapter.

<sup>365</sup> 8 C.F.R. § 245.24(g) (2008).

<sup>366</sup> 8 C.F.R. § 103.7(c)(5)(ii) (2008).



A U visa holder may travel outside of the United States once the victim has been awarded a U visa. This ability to travel is limited in two ways if the victim wishes to apply for lawful permanent residency. First, if the victim travels abroad, the victim must be able to demonstrate that no trip abroad lasted 90 days or longer and that the number of days of travel abroad did not amount to 180 days or longer.<sup>367</sup> If a crime victim travels out of the United States for durations in excess of these limits, the victim loses their ability to file for lawful permanent residency unless the victim shows that the excess absence was necessary to assist in the investigation or prosecution criminal activity or unless the prosecutor certifies that the absence was otherwise justified.<sup>368</sup>

The second limitation on a U visa victim's ability to travel occurs on the date that the U visa victim applies for lawful permanent residency. Generally, U visa victims who have filed applications for lawful permanent residency cannot travel abroad unless they obtain legal permission to travel from DHS.<sup>369</sup> The permission granted is called "advance parole." Advance parole must be received before a U visa victim with a pending application for lawful permanent residency can travel abroad. If a victim with a pending lawful permanent residency application travels abroad without receiving advance parole, DHS deems the victim to have abandoned their application for lawful permanent residency as of the date the victim departed the United States<sup>370</sup> and their lawful permanent residency application will be denied.<sup>371</sup>

Anyone who travels, including a U visa with advance parole,<sup>372</sup> will have to show admissibility every time they re-enter the United States.<sup>373</sup> Even U visa holders whose prior acts were waived when their U visa was granted may be challenged at a port of entry. A crime victim who travels abroad can be barred from reentry into the United States by any inadmissibility factors resulting from past circumstances.

Remaining in the United States and not traveling abroad until after the U visa holder victim obtains lawful permanent residency may be the safest option for many crime victims because DHS officials at U.S. borders or ports of entry have no authority to grant waivers of admissibility. Such waivers may only be granted by DHS officials during the adjudication of a U visa application filed by a U visa holder. U visa victims whose travel strands them abroad without the ability to reenter the United States, jeopardize both their U visa status and the U visa

<sup>367</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75546 (Dec. 12, 2008); 8 C.F.R. § 245.24(a)(1) (2008); *see* INA § 245(m)(2), 8 U.S.C. 1255(m)(2).

<sup>368</sup> ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75546 (Dec. 12, 2008); 8 C.F.R. § 245.24(a)(1) (2008); *see* INA § 245(m)(2), 8 U.S.C. 1255(m)(2).

<sup>369</sup> 8 C.F.R. § 245.2(a)(4)(ii)(B) (2008); ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75551 (Dec. 12, 2008).

<sup>370</sup> 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008). These requirements also apply to U visa holders applying for lawful permanent residency in removal, deportation, or exclusion proceedings before an immigration judge. If the victim has an open case in immigration court leaving the United States will result in a DHS determination that the victim's lawful permanent residency application has been abandoned unless the victim obtains advance parole.

<sup>371</sup> 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008). *See also* ADJUSTMENT OF STATUS TO LAWFUL PERMANENT RESIDENT FOR ALIENS IN T OR U NONIMMIGRANT STATUS, 73 Fed. Reg. 75551 (Dec. 12, 2008); 8 C.F.R. §§ 245.23(j), 245.2(a)(4)(ii)(B) (2008).

<sup>372</sup> 8 C.F.R. § 245.23(j) (2008).

<sup>373</sup> 8 C.F.R. § 245.23(j) (2008).

status of their family members.<sup>374</sup> Applicants should consult with an immigration attorney with U visa experience before traveling outside of the United States. If after consultation the victim determines they can safely travel without triggering bars to reentry into the United States, they should file an Application for Travel Document (Form I-131) and obtain advance parole before departing the U.S.<sup>375</sup>

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<sup>374</sup> 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008).

<sup>375</sup> 8 C.F.R. § 245.23(j) (2008). The filing fee for the advance parole petition may be waived for victims of U visa holders. INA § 245(l)(1)(A)(7) (overruling form instructions and DHS practice prior to Dec. 23, 2008).

## Resources for Crime Victims on U visa Cases

### Technical Assistance for Advocates and Attorneys Working with Immigrant Victims of Domestic Violence, Sexual Assault, Human Trafficking and other U visa Crimes

- NIWAP's Technical Assistance Hotline 202-274-4457 for referrals and technical assistance to attorneys and advocates. For more information also e-mail NIWAP at [info@niwap.org](mailto:info@niwap.org), or visit <http://wcl.american.edu/niwap>.
- **U visa Certification Toolkit** for Federal, State, and Local Judges, Commissioners, and Magistrates <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2>
- **U visa Certification and T visa Deceleration Toolkit** for Law Enforcement Agencies and Prosecutor <https://niwaplibrary.wcl.american.edu/u-visa-toolkit-police-prosecutors>
- **U visa Quick Reference Guide** for Judges <https://niwaplibrary.wcl.american.edu/pubs/u-visa-quick-reference-guide-for-judges>
- **DHS U Visa Law Enforcement Resource Guide** (Feb. 28, 2022) <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022>.
- For more **training materials** on the U visa, visit <https://niwaplibrary.wcl.american.edu/u-and-t-visa-training-materials>
- For **social science research findings** on how U visa victims thrive after receiving work authorization and deferred action as U visa applicants *see*:
  - Transforming Lives: How the VAWA Self-Petition and U Visa Change the Lives of Survivors and Their Children After Employment Authorization and Legal Immigration Status (June 14, 2021) <https://niwaplibrary.wcl.american.edu/transforming-lives-study-21>.

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