

U-Visas: Victims of Criminal Activity¹²

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Introduction

The U-visa is a form of immigration relief designed to offer access to temporary legal immigration status for immigrant victims of domestic violence, sexual assault, human trafficking and a range of other criminal activities. Victims of domestic violence who qualify for VAWA self-petitioning³ may also qualify to file for a U-visa. 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, step-parent or over 21 year old son or daughter. Children included in a U visa victim's application are protected from "aging out" at age 21⁴. VAWA allows children included in their parents' U visa application to receive U visas regardless of whether

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² 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. 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. Lastly, VAWA 2013 expanded the definition of 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. The definition of gender identity used by VAWA is the same definition as applies for federal hate crimes – "actual or perceived gender-related characteristics." 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 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 married to a U.S. citizen or lawful permanent resident spouse without regard to the spouse's gender.

³ For a full discussion of VAWA self-petitioning see Chapter 11 "Preparing the VAWA self-Petition and Applying for Residence" in this manual.

⁴ See VAWA § 805(a) and INA § 214(p) 8 U.S.C. 1184(p)(7)(A)

they turn 21 during the petition's review.⁵ The U-visa was developed to provide the protection of immigration benefits to victims 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, or is a spouse who is not a citizen or lawful permanent resident. Some victims of sexual assault and other crimes may not qualify for VAWA self-petitioning relief because the sexual assault assailant is a stranger. Many sexual assault perpetrators are acquainted to the victim through family, school, university or the abusers attempt to have a dating relationship with the victim. 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.

It is important to note that the U-visa can help several groups of victims of violence against women, 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. citizens or permanent resident can obtain U-visas. The U-visa will also help non-citizen victims of other crimes, 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 for self-petitioning under VAWA in that the U-visa requires that a victim must report to law enforcement officials. To qualify, the battered immigrant must suffer substantial physical or emotional abuse and must cooperate with law enforcement. If an immigrant victim has never called the police, never reported the criminal activity 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 had not filed a police report prior to seeking help as a crime victim can be assisted by victim advocates in making a police report. This is possible even if the incident occurred in the past and if the local police decide not to pursue an investigation of the criminal activity reported.

The purpose of this chapter is to assist advocates and attorneys in identifying sexual assault, domestic violence, and other crime victims who may be eligible for U-visa immigration status and to provide resources to help advocates and attorneys work together to prepare U-visa applications for immigrant crime victims. If a potential U-visa applicant is identified, she should be referred promptly to an immigration attorney or advocate who has experience filing U-visa cases.⁶ 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.⁷

The Violence Against Women Act of 2000

The Violence Against Women Act of 2000 ("VAWA 2000")⁸ created the U-visa for immigrant victims of criminal activity. This 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.⁹ The victim must have information about the criminal activity and a law enforcement official (e.g., police, prosecutor) or a judge must certify that the victim has been helpful, is being helpful, or is likely to be helpful in detecting,

⁵ "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.

⁶ 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 Legal Momentum's Directory, National Resources for Immigrant Women, available at: http://www.legalmomentum.org/help-center/national-resources-for.html#Immigrant_Women_Victims_of_Violence.

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

⁸ Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

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

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investigating or prosecuting the criminal activity.¹⁰ Congress made legislative findings describing why U-visa immigration relief was being created. The purpose of this legislation was to:¹¹

“[C]reate a new nonimmigrant visa¹² 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 aliens¹³, 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 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, as well as parents of applicants who are under 16, may also qualify for a U-visa under certain circumstances. There is no limit on the number of visas available for these qualifying relatives.¹⁴

Adjudication of U- visa Applications

U-visa adjudications have been centralized at the Violence Against Women Act (VAWA) Unit of the DHS Vermont Service Center where all VAWA, T-visa and U-visa cases are adjudicated.¹⁵ The legislative history of the Violence Against Women Act of 2005 describes 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.”¹⁶

All U-visa applications should be filed with the Victims and Trafficking Unit at the DHS Vermont Service Center.¹⁷ Applications filed by victims outside of the United States must also be filed with the Victims and Trafficking Unit following the same process as all other U-visa applicants. Once an application is approved, the Victims and Trafficking Unit of the Vermont Service Center will notify the applicant and grant employment authorization.

¹⁰ INA § 101(a)(15)(U)(i); 8 U.S.C. § 1101(a)(15)(U)(i).

¹¹ Violence Against Women Act of 2000 Section 1513(a), Pub. L. No. 106-386, 114 Stat. 1464. H.R. REP. No. 106-939, at 73 (2000) (Conf. Rep.).

¹² “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.

¹³ 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.

¹⁴ INA § 214(o)(3); 8 U.S.C. § 1184(o)(3).

¹⁵ 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 (October 8, 2003) at 2, available at <http://www.uscis.gov/files/pressrelease/UCntrl100803.pdf>. Forms of temporary status include deferred action, parole and stays of removal.

¹⁶ H.R. REP. NO. 109-233, 116 (2005).

¹⁷ 8 C.F.R. § 214.14(c)(1) (2008).

It is important to note that there are no filing fees required by DHS in U-visa cases. Victims must be afforded access to fee waivers for all DHS imposed filing fees and costs from filing through receipt of lawful permanent residency in U-visa cases.¹⁸ This includes fees associated with inadmissibility waivers (I-192) and waivers of passport or visa requirements (I-193) in U-visa cases.¹⁹ All fees associated with work authorization²⁰ and filing for lawful permanent residency as a U-visa holder are also waivable (form I-485²¹, form I-765²², biometrics²³, I-601²⁴).

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 that gave U-visa eligible immigrants access to legal work authorization and protection from deportation (*deferred action*)²⁵. On October 18, 2007 DHS stopped providing interim relief and began processing U-visas. However, 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.²⁶ As of December of 2010, the waiting time from filing to receipt of work authorization for U-visa victims can often be longer than 6 months.

DHS OFFERS PROTECTION FROM DEPORTATION FOR IMMIGRANTS WITH FILED IMMIGRATION APPLICATIONS: A SAFETY PLANNING OPPORTUNITY

Early screening of immigrant victims of domestic violence and sexual assault for U-visa or VAWA self-petitioning eligibility speeds an immigrant victims’ access to both legal work authorization and protection from deportation. The enhanced victim safety that can be achieved by early identification and filing of U-visa applications and VAWA self-petitions was clarified in August of 2010 when DHS issued a policy guidance.²⁷ The policy guidance instructed DHS trial attorneys and DHS enforcement officers to exercise prosecutorial discretion:

- Should not initiate immigration enforcement actions against immigrants with pending applications for legal immigration status that DHS deems valid;
- Should not detain immigrants with valid pending applications for immigration benefits; and
- To dismiss deportation and removal actions against immigrants with valid pending cases.

Immigration officials adjudicating applications for legal immigration status, under these policies, will decide pending cases:

- Within 30 days if the immigrant who has filed the application is detained; and
- Within 45 days in cases of non-detained immigrants.

¹⁸ William Wilberforce Trafficking Victims Protection Act, Section 201(d) Pub. L. 110-457 (2008); INA §245(l)(7).

¹⁹ 8 C.F.R. § 103.7(c) (2008).

²⁰ INA §245(l)(7).

²¹ 8 C.F.R. § 103.7(c)(5)(ii) (2008) (Adjustment of Status).

²² 8 C.F.R. § 103.7(c)(5)(i) (2008) (Application for Employment Authorization).

²³ 8 C.F.R. § 103.7(c)(5)(i) (2008).

²⁴ 8 C.F.R. § 103.7(c)(5)(ii) (2008) (Form I-601 Application for Waiver of Inadmissibility Grounds).

²⁵ See *generally* Memorandum from Michael D. Cronin, Acting Executive Assoc. Comm’r, Office of Programs, INS to Michael A. Pearson re: VTPA Policy (Aug. 30, 2001) (on file with Legal Momentum and the National Immigration Project of the National Lawyer’s Guild) (hereinafter “Interim Guidance”).

²⁶ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016 (Sept. 17, 2007).

²⁷ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 1 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010).

All victims seeking immigration benefits designed to help immigrant victims of domestic violence, sexual assault, human trafficking, and other crimes covered by the U-visa will benefit from these protections.²⁸ However, these protections against deportation will not benefit immigrant victims unless they have a case that have been filed and is pending with DHS. It is therefore extremely important from a victim safety planning perspective to identify immigrant victims who qualify for U-visa relief as early in the process of working with an immigrant victim as possible. Advocates and attorneys working with immigrant victims are strongly urged to help eligible victims file for U-visa or other VAWA related immigration relief²⁹ before pursuing other legal protections that could trigger an abuser or crime perpetrator reporting the victim to DHS enforcement officials. 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. 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 undocumented 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 of immigration 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.

I. Applying For A Nonimmigrant U-Visa

Benefits of the U-visa

The U-visa provides legal immigration status for qualifying immigrant crime victims. This status offers protection from deportation. The U-visa is of limited duration, 4 years, and is not intended to offer permanent legal immigration status.³⁰ Congress also created a separate provision through which some U-visa holders³¹ may qualify for lawful permanent residency (a green card), allowing an immigrant victim to remain permanently in the United States.³²

U-visa holders are lawfully permitted to accept employment in the United States.³³ Once the U-visa is granted victims are simultaneously provided employment authorization. Legal work authorization is crucial to helping

²⁸ *Id.* at 1. These policies cover only the types of Immigration cases that DHS has the ability to adjudicate once deportation (removal) proceedings have been initiated. In addition to crime victim related immigration protections, these provisions extend to many family based visa petitions.

²⁹ See the 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.

³⁰ 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.

³¹ In order to be eligible for lawful permanent residence, a U-visa holder must prove that she was lawfully admitted to the U.S. as a U nonimmigrant, continues to hold that status (and it has not been revoked), is not inadmissible under INA 212(a)(3)(E) (Participated in Nazi persecution, genocide, or the commission of any act of torture or extrajudicial killing), has been physically present for three years, has cooperated in an investigation of the criminal activity upon which the U-visa was granted, and that her presence is justified "on humanitarian grounds, to ensure family unity, or is in the public interest." INA § 245(m); 8 U.S.C. § 1255(m). 8 C.F.R. §§ 245.23, 245.24 (2008).

³² Immigrant crime victim eligibility for lawful permanent residency will be discussed fully in a later section of this chapter.

³³ 8 C.F.R. § 214.14(c)(7) (2008).

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immigrant victims provide for themselves and their children. It also enhances victim safety by severing economic dependence on an abusive family member or employer.

U-visa applicants may include their family members in their U-visa application. This provides U-visas for families 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 with the victim child care and other issues. U-visa protection 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 applicants can simultaneously file applications for other forms of immigration relief with DHS.³⁴ However, DHS will grant the applicant only one form of immigration relief. The application that is first granted is the form of immigration relief that the immigrant victim applicant will receive and all other pending applications will be denied.³⁵

Who is Eligible to Apply for the Nonimmigrant U-Visa?

In order to be eligible for U-visa status, 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);³⁶
2. Possess information concerning the criminal activity;³⁷
3. Obtain a certification from a law enforcement official, prosecutor, judge, 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 violated the laws of or occurred in the United States.³⁸

What Constitutes Substantial Physical or Mental Abuse?

In order 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.³⁹ Mental abuse is defined as an impairment of emotional or psychological soundness.⁴⁰ 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;
- Permanent or serious harm to the appearance, health, or physical or mental soundness of the victim.⁴¹

³⁴ 214(p)(5), 8 U.S.C.1184(p)(5).

³⁵ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53023 (September 17, 2007).

³⁶ 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 § 801and 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.

³⁷ INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

³⁸ INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

³⁹ INA § 101(a)(15)(U)(i)(I); 8 U.S.C. § 1101(a)(15)(U)(i)(I).

⁴⁰ 8 C.F.R. 214.14(a)(8) (2008).

⁴¹ 8 C.F.R. § 214.14(b)(1) (2008).

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DHS will take into account 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.⁴² 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.⁴³ 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.⁴⁴ Under the Violence Against Women Act's any credible evidence rules victims are allowed to present any credible evidence to prove that they suffered substantial physical or mental abuse.⁴⁵ 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.

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

Congress created an extensive list of criminal activities a U-visa eligible victim may have suffered.⁴⁶

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 ⁴⁷ | Fraud in foreign labor ⁴⁸ |

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, officials should provide victims with

⁴² *Id.*

⁴³ *Id.*

⁴⁴ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53018 (September 17, 2007).

⁴⁵ 8 C.F.R. § 214.14(c)(4) (2008).

⁴⁶ INA § 101(a)(15)(U)(3).

⁴⁷ See VAWA §801 and INA § 101(a)(15)(U)(iii) 8 U.S.C. 1101(a)(15)(U)(iii). These provisions now allow "stalking" to the list of U-visa qualifying crimes, included after "sexual exploitation."

⁴⁸ 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.

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certification and referrals to local advocates and attorneys who can assist the victim in filing for U-visa immigration protection.⁴⁹

The listed crimes are broadly described in the statute in order 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 and the statute and the DHS regulations provide access to U-visa protections for criminal activities that are substantially similar to the listed criminal activities.⁵⁰ 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.⁵¹ The rule provides that:⁵²

“[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 she has 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. Both Congress and DHS agree that U-visas are available to help victims who help with crime detection.⁵³ Assistance with detection of criminal activity may include: filing a police report, calling the police for help and talking to police at the crime scene, or seeking a protection order based on criminal activities.

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 protection of legal immigration status for 4 years. Victims are able to access this relief without regard to how the criminal justice system decides to proceed with the case.

⁴⁹ See, Legal Momentum and the Vera Institute, Toolkit for Law Enforcement Use of the U-Visa (August 2010) available at: <http://iwp.legalmomentum.org/reference/additional-materials/immigration/u-visa/tools/police-prosecutors/Law%20Enforcement%20Toolkit%20U-Visa.pdf>.

⁵⁰ 8 C.F.R. § 214.14(a)(9) (2008).

⁵¹ *Id.*

⁵² New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53018 (September 17, 2007).

⁵³ 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 (September 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 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.

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 she has been a victim of an enumerated criminal activity. In order to establish eligibility, the rule generally requires an applicant to show that she was *directly and proximately*⁵⁴ harmed by qualifying criminal activity. Petitioners who have another form of temporary legal immigration status may apply for and change their status to a U visa.⁵⁵

Indirect Victims

DHS sets out several instances under which indirect victims may establish U-visa eligibility.⁵⁶ Family members 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.⁵⁷ The categories of indirect victims authorized to apply for U-visas are:

- **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.⁵⁸
- **Victims of Perjury, Obstruction of Justice, Witness Tampering:** A victim of witness tampering, perjury or obstruction of justice, or witness tampering is an immigrant who is directly or proximately harmed by the perpetrator of one of these three crimes, 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.⁵⁹
- **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.⁶⁰
- **Victim is incompetent, incapacitated or under age 16:** In a case in which the direct victim of criminal activity is incompetent or incapacitated DHS regulations allow the spouse and under 21 year old children of the direct victim to file a U-visa as an indirect victim. When the direct victim is under the age of 16, indirect victims may be their parent and/or their parents or their unmarried siblings under the age of 18.⁶¹

With regard to the last two categories, 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

⁵⁴ A victim is proximately harmed by a criminal activity if the harm would not have occurred had the criminal activity been not been perpetrated.

⁵⁵ INA Section 248(b).

⁵⁶ 8 C.F.R. § 214.14(a)(14) (2008).

⁵⁷ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁵⁸ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53016. (September 17, 2007).

⁵⁹ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁶⁰ *Id.*; 8 C.F.R. § 214.14(a)(14)(i) (2008).

⁶¹ 8 C.F.R. § 214.14(a)(14)(i) (2008).

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certain family members of deceased, incapacitated, or incompetent victims, the rule encourages these family members to fully participate in the investigation or prosecution.⁶²

Finally, 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.⁶³ If a mother and her two teen age 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 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.⁶⁴ Some U-visa applicants may have criminal convictions.⁶⁵ In such cases, the applicant will not be prevented from qualifying as a victim if the convictions are unrelated to the qualifying criminal activity that caused the victimization.⁶⁶ However, where the victim was a culpable participant in the underlying criminal activity upon which the U application is based, she is precluded from establishing U-visa victimization. Additionally, a U-visa applicant cannot seek U-visas for culpable family members.⁶⁷

What Is Required To Satisfy “Possession of Information”?

The U-visa was enacted to encourage victims of criminal activity to feel safe in reporting crimes against them without adverse immigration consequences. U-visa applicants must prove that they possess information about the criminal activity.⁶⁸ 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.⁶⁹ 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.⁷⁰

What Is Required To Obtain A U-Visa Certification Of Helpfulness?

Ongoing Helpfulness or Willingness to be Helpful

The requirement that an applicant “has been helpful, is being helpful or is likely to be helpful”⁷¹ includes past, present, and future helpfulness. Congress adopted this approach to ensure that certifications were not limited only to cases in which prosecutions were underway or completed. The choice of the term “criminal activity” reflects an understanding that victims do not control the process of criminal investigations or prosecutions. This choice was based on the history and development of the protection orders that were needed to provide domestic violence victims a form of civil legal relief that the victim could initiate and make decisions about how to proceed with an eye predominantly toward victim safety. Whereas criminal domestic violence prosecutions were brought by the state and the victim had little, if any, control over the process, the proceedings or the outcome.

⁶² New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁶³ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53017. (September 17, 2007).

⁶⁴ 8 C.F.R. § 214.14(a)(14)(iii) (2008).

⁶⁵ *Id.*

⁶⁶ Although unrelated criminal activity on the part of the applicant will not prevent her from qualifying as a victim for U-visa purposes, that criminal activity may make her 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.

⁶⁷ 8 C.F.R. § 214.14(a)(14)(iii) (2008).

⁶⁸ INA § 101(a)(15)(U)(i)(II); 8 U.S.C. § 1101(a)(15)(U)(i)(II).

⁶⁹ 8 C.F.R. § 214.14(b)(2) (2008).

⁷⁰ 8 C.F.R. § 214.14(a)(7) (2008).

⁷¹ INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

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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. 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, not just in successful prosecutions. For this reason, victims were granted the opportunity to access U-visa protection early in the criminal justice process, and eligibility is not contingent upon a case going to trial or upon obtaining a conviction. Rather, the U-visa is available to an individual crime victim who is “helpful, was helpful, or will be helpful” in the detection, in an investigation **or** in the prosecution of the criminal activity. The criminal justice process in each case will be different, and different levels of assistance may be required from each victim. For instance, in one case a victim’s testimony at trial might be needed, whereas 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 she was available to assist as necessary.

In assessing how helpful an applicant must be, advocates and attorneys note that the U-visa was designed to help immigrant crime victims willing to be helpful in detection, investigation or prosecution of criminal activity. Victims of qualifying criminal activities continue to qualify for a U-visa who have been helpful or are willing to be helpful without regard to whether or not:⁷²

- ▶ 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.
- ▶ The perpetrator is ultimately convicted of any criminal activity.

Victim Does Not Unreasonably Refuse to Cooperate

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, their helpfulness does not end with the initial report of the criminal activity. Though 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.⁷³ This cooperation requirement is modified however, when the victim’s refusal to cooperate is reasonable. For U-visa holders to obtain lawful permanent residency, victims must prove either cooperation or that their refusal to cooperate was not unreasonable.⁷⁴ When the victim’s ongoing cooperation in the criminal investigation may jeopardize the victim’s safety or the safety of her family members in the U.S. or abroad the victim’s failure to cooperate is not unreasonable. 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, her refusal to cooperate would also not be unreasonable. If the victim has not continued to be helpful in the investigation or prosecution, the victim risks that the certifying official will deem her non-cooperation unreasonable and will contact DHS to provide information about the victim’s non-cooperation, raising the potential that DHS may act on this information and initiate a process for revoking the U-visa.

It is therefore important for advocates and attorneys working with U-visa victims to ensure that law enforcement and prosecution officials are aware of the immigrant victim’s safety concerns that led to her

⁷² 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.

⁷³ 8 C.F.R. § 214.14(b)(3) (2008).

⁷⁴ 8 C.F.R. § 245.24(b)(4) (2008).

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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 or sexual assault may reasonably choose not to continue to be involved the criminal case against the perpetrator. It is also helpful to inform police and prosecutors non-cooperating victims will be unable to attain lawful permanent residency through the U-visa unless they prove to DHS that their failure to offer ongoing cooperation was not unreasonable.

Certification From a Federal, State or Local 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 applicant must include a U-visa certification from a government official who completes a U-visa certification (Form I-918 Supplement B).⁷⁵ The U-visa statute authorizes certifying agencies to sign certifications--⁷⁶

- for victims who cooperated in the past on a case that is now closed or completed (has been helpful)
- for victims currently or recently providing information for ongoing investigations or prosecutions (is being helpful); and
- 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 that there is no time limitation and certifications can be signed any time after the criminal activity occurred. Once a victim receives a certification, the victim must file her 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 within 6 months, the victim will need to obtain a new certification.

The form requires the law enforcement official, judge, prosecutor, or other authorized state, local, or federal employee to certify the following:

- What criminal activity occurred
- 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 investigation or prosecution;
- Note any injuries observed in the police report
- List any family members that may be implicated in commission of the crime.

Congress specified a range of federal, state and local governmental agencies that are authorized to sign U-visa certification. The goal was that certification could be completed by a number of government officials with the authority to detect, investigate or prosecute criminal activities.⁷⁷ Agencies authorized to certify include traditional criminal justice system law enforcement agencies (e.g. police, prosecutors, sheriffs). Other federal, state, and local governmental agencies also have investigative jurisdiction over matters that include criminal activities and have been included among authorized certifying agencies. Agencies and officials who can sign U-visa certifications include but are not limited to:⁷⁸:

- ▶ Federal, state, and local law enforcement agencies (e.g., police, sheriffs, assistant U.S. attorneys, federal marshals, FBI)
- ▶ Federal, state, and local prosecutors
- ▶ Federal, state, and local judges
- ▶ Child Protective Services
- ▶ Adult Protective Services
- ▶ Equal Employment Opportunity Commission
- ▶ Department of Labor
- ▶ Immigration officials
- ▶ Other federal, state, and local investigative agencies

⁷⁵ 8 C.F.R. § 214.14(c)(2)(i) (2008).

⁷⁶ INA § 214(o), 8 U.S.C. 1184(o).

⁷⁷ 8 C.F.R. § 214.14(a)(2) (2008).

⁷⁸ 8 C.F.R. § 214.14(a)(2) (2008).

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The certification must be signed by the head of the certifying agency or designated supervisors.⁷⁹ The DHS regulations anticipate that many agencies will have multiple designated supervisors.⁸⁰ Judges are government officials statutorily authorized by statute to sign U-visa certifications.⁸¹ DHS does not impose the head of agency or supervisor requirement on judges.⁸²

Although DHS encourages certifying agencies to develop certification policies and procedures,⁸³ as of 2010 certifying agencies in many jurisdictions have yet to do so. 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. 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 a protocol 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.⁸⁴

.It is important for advocates and attorneys to work with law enforcement, prosecutors, judges and other government agencies (e.g., EEOC, labor or child abuse investigators) to build a better understanding of the role of the certification, 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.

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.⁸⁵ 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, dependant Indian communities, and Indian allotments⁸⁶
- ▶ Military installations including transportation (vessels, aircrafts) under Department of Defense jurisdiction or military control or lease⁸⁷
- ▶ 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, Seranilla Bank, and Wake Atoll⁸⁸
- ▶ Guam, Puerto Rico, and the U.S. Virgin Islands⁸⁹

For U-visa purposes, criminal activity occurring outside of the United States to be considered qualifying criminal activity there must be a U.S. federal statute that creates extraterritorial jurisdiction that allows for prosecution of that crime in a U.S. court. For example, violation of the federal statute that allows prosecution

⁷⁹ 8 C.F.R. § 214.14(a)(3) (2008).

⁸⁰ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53023. (September 17, 2007); 8 C.F.R. § 214.14(a)(3) (2008).

⁸¹ 101(a)(15)(U)(i)(III).

⁸² A U-visa certification toolkit for judges is available at: <http://iwp.legalmomentum.org/immigration/u-visa/tools/judges>.

⁸³ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53023. (September 17, 2007).

⁸⁴ Sample protocols and tool-kits on the U-visa that are being used in jurisdictions across the country are available at:

http://iwp.legalmomentum.org/immigration/u-visa/tools/police-prosecutors/IMM_UVISA_Sample_Cert_Protocol_OVW1.12.10.pdf/view?searchterm=protocol ;
http://iwp.legalmomentum.org/immigration/u-visa/tools/police-prosecutors/IMM_UVISA_Sample_Cert_Protocol_OVW1.12.10.pdf/view?searchterm=protocol.

⁸⁵ INA § 101(a)(15)(U)(i)(IV); 8 U.S.C. § 1101(a)(15)(U)(i)(IV).

⁸⁶ 8 C.F.R. § 214.14(a)(4) (2008).

⁸⁷ 8 C.F.R. § 214.14(a)(6) (2008).

⁸⁸ 8 C.F.R. § 214.14(a)(11) (2008).

⁸⁹ INA § 101(a)(38); 8 U.S.C. § 1101(a)(38).

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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.⁹⁰

While the criminal activity must have occurred in the U.S. or must have been in violation of a U.S. federal statute which extends 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.⁹¹ Victims may file U-visa applications from abroad in the same manner as all U.S. based victims. Applications are filed directly with the Victims and Trafficking Unit of the DHS Vermont Service Center. Victims may file from abroad for a number of reasons. For some, the qualifying criminal activity may have occurred abroad. Other victims may be filing for U-visa protection from abroad because their abuser took her abroad and then stranded her there with no means to reenter the United States.

Which Family Members of U-Visa Holders Are Eligible To Receive A U-Visa?

Certain family members of U-visa applicants are also eligible to receive U-visas. A U-visa victim may include U-visa petitions for her family members along with the victim's own U-visa application. The victim may also submit U-visa applications for her family members at a later time. 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 numerical cap on the number of U-visas that can be issued to the spouses, children, parents, or siblings of U-visa recipients.⁹²

Family members include the U-visa victim's spouse and children who are under 21 at the time that the U visa application is filed.⁹³ Surviving children of a deceased VAWA self-petitioning parent can continue to have DHS adjudicate the case.⁹⁴ DHS has the power to grant self-petitions to these surviving children.⁹⁵ 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 now allows children included in their parents' U visa application to receive U visas regardless of whether they turn 21 during the petition's review.⁹⁶

Victims under the age of 21, may also request U-visas for their parents and unmarried siblings (under age 18).⁹⁷ A sibling's age is determined as of the date when the sibling's U-visa application is filed.⁹⁸ Children who are born after the application is approved are also considered qualifying family members as long as an additional application is filed on their behalf.⁹⁹ 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.¹⁰⁰

Removal Proceedings

Victims Currently in Removal Proceedings

Victims who are currently in removal proceedings may file U-visa applications with DHS. Immediately following the victim's filing of a U-visa case, counsel for the victim should notify the DHS, Immigration and Customs Enforcement Office of Chief Counsel (OCC) and the trial attorney and the immigration court of the

⁹⁰ 8 C.F.R. § 214.14(b)(4) (2008).

⁹¹ 8 C.F.R. §§ 214.14(c)(5)(i)(A)-(B) (2008).

⁹² INA § 214(o); 8 U.S.C. § 1184(o).

⁹³ INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

⁹⁴ INA § 204(b) 8 U.S.C. 1154(l)(2)

⁹⁵ Id.

⁹⁶ "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.

⁹⁷ INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

⁹⁸ 8 C.F.R. § 214.14(f)(4) (2008).

⁹⁹ 8 C.F.R. § 214.14(f)(4)(i) (2008).

¹⁰⁰ 8 C.F.R. § 214.14(f)(1) (2008)..

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fact that the U-visa case has been filed. Under policies issued by DHS on August 20, 2010¹⁰¹ and on September 24, 2009¹⁰² the upon receiving notification that a U-visa application has been filed with DHS the Office of Chief Counsel will be required to:

- notify the Victims and Trafficking Unit at the Vermont 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 Service Center,
- when the victim has been detained, make the victim available for any interview that the Vermont Service Center may be require.¹⁰³
- upon receipt of a copy of the U-visa filing from the crime victim's attorney, review the filing to determine if as a matter of law the immigrant victim s eligible for relief from removal (e.g. it appears likely that the victim will be granted a U-visa), the Office of Chief Counsel should—¹⁰⁴
 - promptly move to dismiss the immigration court case without prejudice¹⁰⁵ and
 - if the victim is detained, secure the victims 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 DHS in this manner within 30 days when the immigrant victim is detained. If the victim is not detained, but is involved in removal proceedings the **Victims and Trafficking Unit** will endeavor to adjudicate the immigrant crime victim's case within 45 days of receiving the applicant's case file (A-file).

Although DHS policy places the responsibility for requesting that the **Victims and Trafficking Unit** expedite adjudication of the U-visa case on DHS trial attorneys and the Office of Chief Counsel and not on the victim's attorney or the immigration judge,¹⁰⁶ it is important that attorneys representing immigrant victims take all steps needed to assure that the request is both made and received by the **Victims and Trafficking Unit**. Attorneys representing U-visa victims should take all steps necessary to ensure that the U-visa case filed is complete and contains all available evidence. Attorneys must respond quickly to any requests for further evidence from the Victims and Trafficking Unit. It is recommended that attorneys for U-visa applicants with cases before the immigration court also communicate through the **Victims and Trafficking Unit** hotline¹⁰⁷ or e-mail¹⁰⁸ 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.¹⁰⁹

Family members who are eligible to apply for U-visas are also eligible to have their immigration case dismissed without prejudice or terminated.¹¹⁰ If the proceedings are terminated and subsequently the U-visa is denied, the applicant may be reissued a *Notice to Appear* and once again placed in removal proceedings.¹¹¹ If

¹⁰¹ 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, August 20, 2010).

¹⁰² Davie Venturella, Guidance Adjudicating Stay Requests Filed By U Nonimmigrant Status (U-Visa) Applicants (DHS, Immigration and Customs Enforcement, September 24, 2009).

¹⁰³ As of December 2010, the Vermont Service Center has not been requiring interviews with victims in connection with the adjudication of U-visa cases.

¹⁰⁴ 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, August 20, 2010).

¹⁰⁵ 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).

¹⁰⁶ 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, August 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.

¹⁰⁷ The Vermont Service Center VAWA Hotline is 1-802-527-4888.

¹⁰⁸ Attorneys representing immigrant victims should elect to communicate with Victims and Trafficking Unit supervisors by either telephone or e-mail – Not Both. The e-mail is: hotlinefollowup18914.vsc@dhs.gov

¹⁰⁹ 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, www.asistahelp.org; or National Immigrant Women Advocacy Project, niwap@wcl.american.edu, (202) 274-4457, <http://www.wcl.american.edu/niwap/>

¹¹⁰ 8 C.F.R. §§ 214.14(c)(1)(i), (f)(2)(i) (2008).

¹¹¹ 8 C.F.R. §§ 214.14(c)(5)(ii), (f)(6)(iii) (2008).

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the victim received a stay of removal from either the immigration court or DHS if the U-visa application is denied the order to stay the removal will be terminated effective the date of the denial.¹¹²

Victims With Prior Orders of Removal

Victims who already have a final removal order remain eligible to file a U-visa application with DHS.¹¹³ Filing the U-visa application will not in and of itself prevent the applicant's removal.¹¹⁴ To protect victims who are in the United States against the victim's removal before being granted a U-visa, an application for a discretionary stay of removal must be filed on the victim's behalf with DHS.¹¹⁵ A stay of deportation or removal is an administrative decision by DHS to stop temporarily the deportation or removal of an alien who has been ordered deported or removed from the United States.¹¹⁶ This will stay their removal pending a decision on their U-visa application.¹¹⁷ If the 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.¹¹⁸

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, the alien may seek cancellation of such order by filing, with the immigration judge or the Board, a motion to reopen and terminate removal proceedings.¹¹⁹ For victims granted U-visas who have exceeded either or both time and numerical limitations for the 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 reopen.¹²⁰ The 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 each of these cases will be cases in which the victim as a matter of law as a U-visa holder is entitled to relief from removal.¹²¹

Confidentiality and Credible Evidence Standard

Confidentiality: As with other types of cases under the Violence Against Women Act, DHS is required to keep all information about U-visa applications confidential.¹²² They cannot release information about the existence of a case to any person who is not authorized to access that information for a legitimate law enforcement purpose or other statutorily prescribed purpose.¹²³ If the perpetrator of the crime or any of his or her family members 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 (*e.g.* removal action). Further, DHS is precluded from relying on information provided solely by the abuser or his family members to initiate or take any part of an enforcement action against the victim.¹²⁴ Additionally, DHS policies urge DHS

¹¹² 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.

¹¹³ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53022, 53037 (September 17, 2007); 8 C.F.R. §§ 214.14(a)(3), (c)(1)(ii), (f)(2)(ii) (2008).

¹¹⁴ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53022 (September 17, 2007).

¹¹⁵ 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).

¹¹⁶ 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. 53016 (September 17, 2007).

¹¹⁷ 8 C.F.R. §§ 214.14(c)(1)(ii), (f)(2)(ii) (2008).

¹¹⁸ 8 C.F.R. §§ 214.14(c)(5)(i), (f)(6) (2008).

¹¹⁹ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53023 (September 17, 2007).

¹²⁰ *Id.* 8 C.F.R. §§ 1003.2, 1003.23 (2008).

¹²¹ John Morton, Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions, 3-4 (DHS, U.S. Immigration and Customs Enforcement, August 20, 2010)

¹²² 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.

¹²³ *Id.*

¹²⁴ For further information about the confidentiality protections, see the chapter in this manual entitled "VAWA Confidentiality: History, Purpose and Violations."

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enforcement officials to exercise prosecutorial discretion to avoid initiating enforcement actions against immigrant crime victims.¹²⁵

Credible Evidence Standard:¹²⁶ DHS is required to consider “any credible evidence” when deciding U-visa cases and U-visa holder’s applications for lawful permanent residency.¹²⁷ 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 requirement. The credible evidence standard was first created by the Violence Against Women Act in the context of VAWA self-petitions and other 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.¹²⁸ 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 her U-visa or the application will be rejected as incomplete.

Waiver of Inadmissibility¹²⁹

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. 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. Waivers are not available for applicants who have committed Nazi persecution, genocide, or an act of torture or extra judicial killing.¹³⁰ U-visa victims who have committed violent or dangerous crimes and security-related crimes¹³¹ will only be granted waivers upon a showing of extraordinary circumstances.¹³² VAWA 2013 exempts self-petitioners and T/U visa petitioners from the “public charge” inadmissibility by creating a special exception. As a result, immigrant crime victims who had previously been deemed inadmissible to the United States because they might become a public charge can more easily access the public benefits safety net without risking being denied lawful permanent residency. As a person who is primarily dependent on the US government for subsistence is considered a public charge and is inadmissible to the United States abused immigrants and crime victims are exempt from this public charge requirement.¹³³

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”¹³⁴ 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. When a victim has

¹²⁵ John P. Torres, Interim Guidance Relating to Officer Procedure Following Enactment of VAWA 2005 2-3 (January 22, 2007).

¹²⁶ 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 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).

¹²⁷ 8 C.F.R. §§ 214.14(c)(4), (f)(5) (2008).

¹²⁸ As defined by INA 212(a)(3)(E). See INA § 204(a)(1)(J); 8 U.S.C. § 1154(a)(1)(J).

¹²⁹ Grounds of Inadmissibility (INA section 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.

¹³⁰ INA § 212(d)(14); 8 U.S.C. § 1182(d)(14).

¹³¹ Described in INA §§ (212)(a)(3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii) or (3)(C).

¹³² 8 C.F.R. § 212.17(b)(2) (2008).

¹³³ See 8 U.S.C. § 1182(a)(4)(E) INA § 212(a)(4) and Section 804 of VAWA

¹³⁴ For a full list of inadmissibility grounds see INA § 212. See also VAWA Red Flags available at:

http://iwp.legalmomentum.org/immigration/vawa-self-petition-and-cancellation/tools/VAWA_Red%20Flags.pdf/view?searchterm=red+flag.

adverse factors in her background it is essential that she have an immigration attorney with U-visa expertise representing her. 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 the social and humane 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.¹³⁵

Approval and Duration

U-visas approved for an immigrant victim and the victim's family members who applied together with the victim will have a 4-year duration. U-visa victim can apply for an extension of her 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.¹³⁶

When a U-visa victim applies for her family members at a later date than the victim filed his or her 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 an U-visa extension.¹³⁷

The DHS **Victims and Trafficking Unit** adjudicates U-visa cases in the order that they are received. Only 10,000 U-visas may be awarded each fiscal year. Once the cap of 10,000 per year is reached DHS will continue to review cases but cannot issue U-visas. 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 until the primary victim U visa petitioner's petition is approved. Family members' U-visa applications will be adjudicated based on the U-visa victim's place in line. U-visa victims and their family members placed on the waiting list will be issued deferred action.

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-1 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 with accompanying fee or a fee waiver request.

¹³⁵ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53021. (September 17, 2007)..

¹³⁶ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status; Interim Rule, 72 Fed. Reg. 53028 (September 17, 2007). 8 C.F.R. § 214.14(g) (2008). The application for extension of status must be filed using DHS Form I-539.

¹³⁷ 8 C.F.R. § 214.14(g)(2)(i) (2008).

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- ❑ 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.¹³⁸
- ❑ 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.¹³⁹

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:

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

¹³⁸ 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.

¹³⁹ 8 C.F.R. § 103.7(c)(5)(i) (2008).

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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 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

II. U-Visa Holder's Applications for Lawful Permanent Residency¹⁴⁰

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;¹⁴¹
- Have current U-visa status;¹⁴²
- 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)¹⁴³;
- 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 his or her presence in the United States is justified:¹⁴⁴
 - 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 residency¹⁴⁵

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 residency.¹⁴⁶ U-visa lawful permanent residency applications are adjudicated the DHS **Victims and Trafficking Unit** in the order that the applications are received.¹⁴⁷ 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.¹⁴⁸ DHS is the sole agency authorized to grant lawful permanent residency to U-visa victims.¹⁴⁹ 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 2009.¹⁵⁰

Once the U-visa applicant's case has been adjudicated, DHS will issue a written notice of approval and the

¹⁴⁰ 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), available at www.immigrantwomensnetwork.org.

¹⁴¹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75540, 75546 (December 1, 2008).

¹⁴² *Id.*

¹⁴³ 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 Federal Register 75546 (December 1, 2008).

¹⁴⁴ INA § 254(m); 8 C.F.R. § 245.24(d) (2008).

¹⁴⁵ 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 Federal Register 75549 (December 1, 2008).

¹⁴⁶ 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 Federal Register 75546 (December 1, 2008).

¹⁴⁷ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75555 (December 1, 2008).

¹⁴⁸ *Id.*

¹⁴⁹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008). Immigration judges do not have legal authority rule on lawful permanent residency for U-visa victims.

¹⁵⁰ See VAWA § 809 and 705(c) of the Consolidated Natural Resources Act of 2008 48 U.S.C. 1806 note

notice will instruct the applicant on how to obtain temporary lawful permanent residency documentation.¹⁵¹ 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.¹⁵² Applicants must complete a form from which DHS will produce a green card (Form I-89).¹⁵³

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.¹⁵⁴ 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.¹⁵⁵ 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

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.¹⁵⁶ U-visas are granted for up to four years. After three years, U-visa holders are eligible to apply for lawful permanent residency.¹⁵⁷ 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.¹⁵⁸ Those who timely apply for lawful permanent residency retain U-visa status until DHS adjudicates their application for lawful permanent residence.¹⁵⁹ Applicants whose U-visas have been revoked are not eligible to apply for lawful permanent residence as U-visa holders.¹⁶⁰

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;¹⁶¹ 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;¹⁶² or
- That any absence in excess of the 90/180 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.¹⁶³

¹⁵¹ *Id.*; 8 C.F.R. § 245.24(f) (2008).

¹⁵² 8 C.F.R. § 245.24(f)(1) (2008); *see* INA § 245(m)(4); 8 U.S.C. 1255(m)(4).

¹⁵³ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁵⁴ 8 C.F.R. § 245.24(f)(2) (2008).

¹⁵⁵ 8 C.F.R. § 245.24(k) (2008).

¹⁵⁶ 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 Federal Register 75546 (December 1, 2008).

¹⁵⁷ 8 C.F.R. § 245.24(b)(3) (2008); *see* INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A).

¹⁵⁸ 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.

¹⁵⁹ INA § 245(l)(1)(A); 8 U.S.C. § 1255(l)(1)(A).

¹⁶⁰ 8 C.F.R. § 245.24(c) (2008).

¹⁶¹ 8 C.F.R. § 245.24(b)(3) (2008); *see* INA § 245(m)(1)(A); 8 U.S.C. 1255(m)(1)(A).

¹⁶² 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.

¹⁶³ 8 C.F.R. § 245.24(a)(1) (2008); *see* INA § 245(m)(2); 8 U.S.C. 1255(m)(2).

The applicant must submit an affidavit attesting to her 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.¹⁶⁴ However, there should be no significant chronological gaps in documentation.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ 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.¹⁷²

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.¹⁷³ Although U-visa holders seeking lawful permanent residency are not required to establish admissibility,¹⁷⁴ in deciding whether to exercise discretion to grant lawful permanent residency to an immigrant crime victim, DHS will weigh both favorable and adverse factors in the victim's case.¹⁷⁵ The victim has the burden of showing that discretion should be exercised in their favor.¹⁷⁶ Any inadmissibility factors present in the victims case that arose after the victim received U-interim relief and a U-visa are likely to be considered by DHS in adjudicating the victims application for lawful permanent residency.¹⁷⁷ 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.¹⁷⁸

¹⁶⁴ 73 Fed. Reg. 75,548 (2008-12-12).

¹⁶⁵ *Id.*

¹⁶⁶ See generally 8 C.F.R. § 245.22 (2008).

¹⁶⁷ 8 C.F.R. § 245.22 (2008).

¹⁶⁸ 8 C.F.R. §§ 245(d)(5), (6) (2008).

¹⁶⁹ 73 Fed. Reg. 75,548 (2008-12-12).

¹⁷⁰ 73 Fed. Reg. 75,548 (2008-12-12).

¹⁷¹ 8 C.F.R. §§ 245.24(d)(5), (6) (2008).

¹⁷² 8 C.F.R. §§ 245.24(d)(5), (6) (2008). Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁷³ INA § 212(a)(3)(E), 8 U.S.C. 1182(a)(3)(E); INA § 245(m)(1), 8 U.S.C. 1255(m)(1).

¹⁷⁴ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁷⁵ *Id.*

¹⁷⁶ 8 C.F.R. § 245.24(d)(11) (2008).

¹⁷⁷ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008). For more on inadmissibility grounds see the chapter "Human Trafficking and the T Visa" at 21-22 in this manual.

¹⁷⁸ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

To prove that DSH 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.¹⁷⁹ 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, he or she 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.¹⁸⁰ These mitigating factors may not be sufficient, absent the "most compelling positive factors,"¹⁸¹ 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.¹⁸²

Proving 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.¹⁸³ Both the victim and any family members¹⁸⁴ who receive U-visas who apply for lawful permanent residency should¹⁸⁵ provide proof including:

- Whether they were asked to offer assistance, by whom; and how they responded¹⁸⁶ and
- 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.¹⁸⁷ The determination of whether a victim's refusal to provide was unreasonable is a DHS decision.¹⁸⁸ 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.¹⁸⁹ This need not be the same official who signed the U-visa certification. Alternately, 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.¹⁹⁰

¹⁷⁹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁸⁰ 8 C.F.R. § 245.24(d)(11) (2008). (The application for lawful permanent residency is called "adjustment of status" under immigration law)

¹⁸¹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549 (December 1, 2008).

¹⁸² 8 C.F.R. § 245.24(d)(11) (2008).

¹⁸³ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁸⁴ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 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).

¹⁸⁵ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 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).

¹⁸⁶ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008). 8 C.F.R. §§ 245.24(d)(8), 245.24(e) (2008).

¹⁸⁷ 8 C.F.R. § 245.24(a)(5).

¹⁸⁸ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁸⁹ 8 C.F.R. § 245.24(e)(1) (2008).

¹⁹⁰ 8 C.F.R. § 245.24(e)(3) (2008).

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DHS will take into account the totality of the circumstances.¹⁹¹ Factors¹⁹² that may be considered in this determination are:¹⁹³

- 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
 - 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 persons in connection with the qualifying criminal activity.”¹⁹⁴ 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 and DHS is authorized under the regulations to seek such information from federal or state law enforcement or prosecutorial entities.¹⁹⁵

Documentary Evidence for U-Visa Holders Applying for Lawful Permanent Residency

Applications for lawful permanent residency filed by U-visa holders and their U-visa holder or U-visa eligible family members are to be submitted to the **Victims and Trafficking Unit** of the DHS Vermont Service Center. The **Victims and Trafficking Unit** will adjudicate lawful permanent residency applications for U-visa holders.¹⁹⁶

Documents required for U-Visa Lawful Permanent Residency Applications¹⁹⁷ 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;¹⁹⁸
- 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 relief and/or a U-visa for the required three year period¹⁹⁹ and documentation showing the

¹⁹¹ 8 C.F.R. § 245.24(a)(5) (2008).

¹⁹² 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.

¹⁹³ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75547 (December 1, 2008).

¹⁹⁴ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75548 (December 1, 2008). (Such evidence may have been submitted to DHS by the federal or state government official.)

¹⁹⁵ 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 Federal Register 75547 (December 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.

¹⁹⁶ 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 December 2010 this has not been a frequent or regular procedure.

¹⁹⁷ 8 C.F.R. § 245.24(d) (2008).

¹⁹⁸ 8 C.F.R. § 103.7(c)(5)(ii) (2008).

¹⁹⁹ The applicant may alternately provide an equivalent travel document or a valid explanation of why the applicant does not have a passport.

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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 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.²⁰⁰
- 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;²⁰¹
 - Evidence, including an affidavit from the applicant that he or she has 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), cannot be waived.

²⁰⁰ 8 C.F.R. § 245.24(d)(5)(2008).

²⁰¹ See more details about documentation of this below.

Documentation That the Victim Did Not Unreasonably Refuse to Provide Assistance in the Investigation or Prosecution²⁰²

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.²⁰³ 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.²⁰⁴ 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.”²⁰⁵

- *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:²⁰⁶
 - 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 reasons²⁰⁷
 - Depending on the circumstances, evidence might include:
 - Court documents
 - Police reports
 - News articles
 - Copies of reimbursement forms for travel to and from court, or
 - Affidavits of other witnesses or officials²⁰⁸

Petitioning For Family Members to Attain Lawful Permanent Residency Who Did Not Have U-visas²⁰⁹

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

²⁰² 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.

²⁰³ 8 C.F.R. § 245.24(e)(1) (2008).

²⁰⁴ *Id.*

²⁰⁵ 8 C.F.R. § 245.24(e)(2) (2008).

²⁰⁶ 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 Federal Register 75547 (December 1, 2008).

²⁰⁷ *Id.*

²⁰⁸ Preamble at 27.

²⁰⁹ INA § 245(m); 8 U.S.C. 1255(m).

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residency.²¹⁰

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 and that family relationship continues to exist through the adjudication of the qualifying family members 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).²¹¹
 - Victims under the age of 21 their spouse, children, parents and unmarried siblings (under age 18).²¹²
 - A U-visa victim's children who are born after the application is approved.²¹³
 - 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
- The U-visa victim has:²¹⁴
 - 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.²¹⁵ The family member must include the filing fee²¹⁶ or request a fee waiver²¹⁷ 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.²¹⁸ The victim files Form I-929, with a fee, or a fee waiver request²¹⁹ at the **Victims and Trafficking Unit** of the DHS Vermont Service Center. The application should include evidence establishing the U-visa holder's relationship to the family member.²²⁰

- Preferred evidence of the family relationship includes:
 - Birth certificates; or
 - Marriage certificates
- Secondary evidence may be submitted where primary evidence is not available.²²¹ The applicant may

²¹⁰ 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.

²¹¹ INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

²¹² INA § 101(a)(15)(U)(ii); 8 U.S.C. § 1101(a)(15)(U)(ii).

²¹³ 8 C.F.R. § 214.14(f)(4)(i) (2008).

²¹⁴ 8 C.F.R. § 245.24(g) (2008).

²¹⁵ INA § 245(m)(3); 8 U.S.C. § 1255(m)(3).

²¹⁶ 8 C.F.R. § 103.7(b)(1) (2008).

²¹⁷ 8 C.F.R. § 103.7(c)(5)(i) (2008).

²¹⁸ 8 C.F.R. § 245.24(h) (2008).

²¹⁹ 8 C.F.R. §§ 245.24(h)(1)(ii), (i)(l)(iii), (iv) (2008).

²²⁰ 8 C.F.R. § 245.24(h)(1)(iii) (2008).

²²¹ 8 C.F.R. § 103.3(b)(2) (2008).

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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.²²² Applications will be reviewed on a case-by-case basis, and the USCIS will consider all credible evidence and adjudicate as a matter of discretion. If the immigrant visa 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.²²³

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 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 to be granted work authorization.²²⁴

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.²²⁵ DHS will forward the approval notice to the National Visa Center for consular processing or to a Port Of Entry.²²⁶ Family members who are outside of the United States will be required to show admissibility to be granted entry into the United States.²²⁷

Documentation for Family Member's Immigrant Visa Applications²²⁸

- 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;²²⁹
- Biometric services fee or a fee waiver request;
- Evidence of admissibility for family members living abroad.

²²² 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.

²²³ 8 C.F.R. § 245.24(h)(2)(ii) (2008).

²²⁴ 8 C.F.R. § 274a.12(c)(9) (2008).

²²⁵ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Federal Register 75549-50 (December 1, 2008).

²²⁶ 8 C.F.R. § 245.24(h)(2)(i)(A) (2008).

²²⁷ INA § 212(a); For further information about admissibility see the discussion of admissibility earlier in this chapter.

²²⁸ 8 C.F.R. § 245.24(g) (2008).

²²⁹ 8 C.F.R. § 103.7(c)(5)(ii) (2008).

Limitations on Travelling Outside of the United States On A U-Visa

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, should the victim travel abroad, the victim must be able to demonstrate that no trip abroad lasted for 90 days or longer and that the number of days of travel abroad did not amount to 180 days or longer.²³⁰ 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.²³¹

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 from DHS legal permission to travel.²³² 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 his or her application for lawful permanent residency as of the date the victim departed the United States²³³ and their lawful permanent residency application will be denied.²³⁴

Anyone who travels, including a U-visa with advance parole,²³⁵ will have to show admissibility every time they re-enter the United States.²³⁶ 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. 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 status of their family members.²³⁷ 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 who seek advance parole should file an Application for Travel Document (Form I-131) and obtain advance parole before departing the U.S.²³⁸

²³⁰ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75546 (December 12, 2008); 8 C.F.R. § 245.24(a)(1) (2008); see INA § 245(m)(2), 8 U.S.C. 1255(m)(2).

²³¹ *Id.*

²³² 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 (December 12, 2008).

²³³ 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.

²³⁴ 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008). Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75551 (December 12, 2008); 8 C.F.R. §§ 245.23(j), 245.2(a)(4)(ii)(B) (2008).

²³⁵ 8 C.F.R. § 245.23(j) (2008).

²³⁶ 8 C.F.R. § 245.23(j) (2008).

²³⁷ 8 C.F.R. §§ 245.24(j), 245.2(a)(4)(ii)(A) (2008).

²³⁸ 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 December 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, or visit <http://wcl.american.edu/niwap>.

National Immigrant Women's Advocacy Project (NIWAP, pronounced *new-app*)
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4910 Massachusetts Avenue NW · Suite 16, Lower Level · Washington, DC 20016
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