



Certifying Early: When Should You Sign a U or T Visa Certification for a Victim?

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Prosecutors handling cases where the victim is undocumented must be prepared to address challenges in the case related to the victim’s immigration status. Immigrant victims may misunderstand or distrust the criminal justice system, they may believe that the system will not work for them, or they believe that they will be deported if they cooperate with law enforcement or prosecutors. Fears about deportation are closely linked to fears that by participating in the criminal justice system they risk being separated from their children. Offenders will often instill this fear and distrust in their victims and use the victim’s precarious immigration status to assert power and control and to prevent the victim from seeking help. These dynamics often result in the victim being unable to participate in the criminal justice system and appearing to be uncooperative. Many of these challenges can be ameliorated by providing the certifications needed by victims filing for immigration relief through the U and T visa programs¹.

Providing a victim with a certification for a U² or T³ Visa application can build rapport, establish trust, protect the victim from the offender, dispel the victim’s fear of deportation, and enhance the victim’s ability to participate in the prosecution.⁴ However, prosecutors often fear that by providing a victim with a U or T Visa certification, the prosecution will be vulnerable to attacks by the defense that the victim has an improper motive to testify and/or that the victim is biased towards the prosecution/government because they have been given an immigration benefit. In response to this fear, there has been a reluctance on the part of prosecutors to sign U and T Visa certifications prior to the resolution of the criminal case. Prosecutors have also advised law enforcement that they would prefer that law enforcement officials not sign U or T Visa certifications early in the investigation. While this response is understandable, it undermines one of the primary purposes of offering immigration relief to victims of crime: protecting the victim from deportation and undermining the ability of offenders to use threats of deportation to coerce, control, and tamper with the victim’s participation in the criminal investigation or prosecution.

A victim may only apply for a U Visa if a law enforcement officer, prosecutor, or other designated⁵ government agency certifies that:

- They have probable cause to believe that the victim is a victim of a qualifying criminal activity,⁶
- That that criminal activity occurred in the United States, and

¹ If you need technical assistance on a cases involving an immigrant crime victim please contact NIWAP at (202) 274-4457 or info@niwap.org. Prosecutors should also call AEQUITAS for technical support for prosecutors working on cases involving immigrant victims (202) 558-0040 or info@aequitasresource.org.

² For more information relevant to this document see: Jane Anderson, Leslye E. Orloff, and Benish Anver, *What's Immigration Status Got to Do with It? Prosecution Strategies for Cases Involving Undocumented Victims* (2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/pretrial-strategies-7-1-17-final-with-logos>; Jane Anderson & Benish Anver, *Quick Reference Guide for Prosecutors: U Visa and VAWA Confidentiality Related Case Law* (2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/case-law-quick-reference-tool-7-24-17-final-w-logo>; Jane Anderson, Leslye E. Orloff, and Benish Anver, *VAWA Confidentiality and Criminal Cases: How Prosecutors Should Respond to Discovery Attempts for Protected Information* (2017), available at: <http://niwaplibrary.wcl.american.edu/pubs/discovery-and-vaawa-confidentiality-tool-final-7-24-17>

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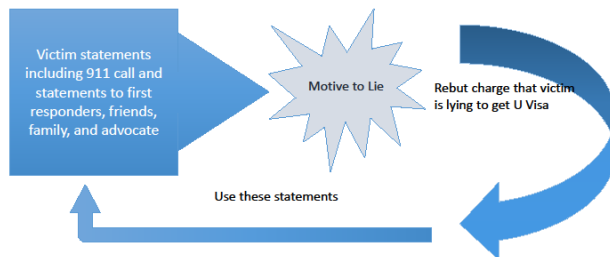
- That the victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of the offender.⁷

The certification provides the United States Citizenship and Immigration Services (USCIS) with evidence of the victim’s victimization and the victim’s past, present, or likely future helpfulness. Without a signed certification, the victim cannot apply for a U Visa and therefore, the victim will not be protected from deportation or from the offender’s threats of deportation.⁸ USCIS reviews U visa applications, along with the certifications, and places a flag in the files that USCIS believes are valid. This is to alert all DHS officials that the applicant is a victim of a crime and should not be subject to detention or deportation proceedings, particularly at the perpetrator’s behest.⁹

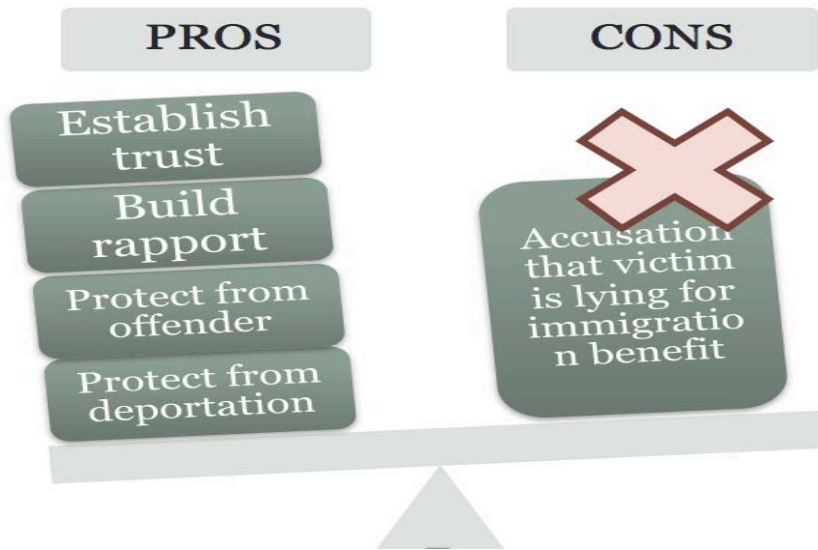
Certifying early gives prosecutors the opportunity to not only build rapport, establish trust, and ensure the safety of the victim; it can also be strategically beneficial to your case. Where a defense attorney alleges, either explicitly or implicitly, that the victim is only testifying to receive an immigration benefit or to curry favor with the government, the defense opens the door to rebuttal evidence in the form of prior consistent statements. Prior consistent statements are admissible as non-hearsay to rebut an allegation of recent fabrication or improper motive when the prosecution can show that the motive to lie (here, when the victim learned about the U Visa) arose after the statements were made¹⁰.

Introducing Statements

- Establish timeline of when victim was told about U Visa/VAWA and statement made prior to that time



As an example, you may have a case where the victim called 911 during a domestic violence incident and police responded, starting an investigation. You can imagine that that victim made statements to a neighbor, a 911 operator, the first responder, and the detective before she was introduced to a victim advocate who advised her that she may qualify for a U Visa. Since the “motive to lie” arose at the time that the victim met the victim advocate, all the prior consistent statements may be admitted as non-hearsay prior consistent statements to rebut the allegation that the victim is only testifying about the domestic violence incident for the purpose of obtaining a U Visa¹¹. In this case, certifying early does not negatively impact the prosecution where the defense’s accusation is rebutted by further evidence of the crime charged.



¹ While this document will focus on the U Visa, many of the strategies addressed will also apply to cases where a victim is seeking Continued Presence and/or a T Visa. It should be noted however that a victim may apply for a T Visa without a signed T Visa certification. However, a victim cannot apply for a U Visa without a signed certification. For more information about Continued Presence and T Visas, see Department of Homeland Security, Blue Campaign, Continued Presence: Temporary Immigration Status for Victims of Human Trafficking, (2010) available at <http://niwaplibrary.wcl.american.edu/pubs/continued-presence-temp-imm-status/>; Department of Homeland Security, Blue Campaign, Information for Law Enforcement Officials: Immigration Relief for Victims of Human Trafficking and Other Crimes, (2014) available at <http://niwaplibrary.wcl.american.edu/pubs/bc-infosheet-law-enforcement-english/>; Department of Homeland Security, Infographic: Protections for Immigrant Victims, available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-protections1-6-links-121516/>

² The U visa helps immigrant victims of qualifying criminal activities covered by the U visa statute INA Section 101 (a)(15)(U)(iii) are: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud in foreign labor contracting, being held hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and related criminal activities or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes. "DEP'T OF HOMELAND SEC, U and T Visa Law Enforcement Resource Guide, 7 (2015), available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015>

³ T visas provide protection for immigrant victims of severe forms of human trafficking as defined by 22 U.S.C. § 7102(9) and (10): Sex Trafficking, which is defined as: o the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act, or in which the person induced by any means to perform such act has not attained 18 years of age; or Labor Trafficking, which is defined as: the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

⁴ Research has found that over time, once certification is obtained and the DHS U visa cases has been filed, immigrant U visa applicants' cooperation rates in criminal investigations and prosecutions is high. See Leslye E. Orloff, Levi Wolberg, and Benish Anver, *U-Visa Victims and Lawful Permanent Residency*, 5 (September 6, 2012) (70% of U visa applicants/recipients provide continued cooperation in criminal investigations and prosecutions; another 29% are willing to offer cooperation but further cooperation was not sought by law enforcement or prosecution officials), <http://niwaplibrary.wcl.american.edu/pubs/pb-tkit-uvisalawfulpermanentresidency-9-6-12/>; Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending*, 3 (June 18, 2014) (73.1% of U visa applicants are cooperating with law enforcement and prosecution with 50.3% continuing to file police reports for new crimes suffered while their U vis application is pending, and 25.2% continue to file police reports once their U visa case is approved), <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/>;

⁵ Other individuals that may certify include judges, magistrates, commissioners, police, adult and child protective services, the EEOC, state and federal labor enforcement agencies, and other state or federal agencies with civil, criminal or administrative investigative or prosecutorial authority. See Department of Homeland Security, U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies 6 (November 30, 2015) available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>

⁶ In drafting the U visa, Congress chose the term "criminal activity" as opposed to "crime" to ensure that victims could file for and receive U visa protection from deportation early in the criminal investigation and/or prosecution and without regard to the outcome of any criminal case filed. U Visa Regulations 72 Fed. Reg. 53018 (September 17, 2007) available at <http://niwaplibrary.wcl.american.edu/pubs/federal-register-new-classification-victims-criminal-activity-eligibility-u-nonimmigrant-status-interim-rule/>; Department of Homeland Security, U and T Visa Law Enforcement Resource Guide

for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies 18-19 (November 30, 2015) <http://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>

⁷ This is a paraphrased list of items included in the certification. For the full list of certifying questions, *see* U Visa Certification Form 918 B (March 2017) available at <http://niwaplibrary.wcl.american.edu/pubs/form-i-918-supplement-b/>; and U Visa Certification Form Instructions (March 2017) available at <http://niwaplibrary.wcl.american.edu/pubs/instructions-i918-unonimm-status/>;

⁸ *See*, Krisztina E. Szabo & Leslye E. Orloff, The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending (June 18, 2014) (Once an immigrant victim files for crime victim based immigration protection perpetrators are often actively involved in trying to get victims detained or deported by immigration officials - U visas cases 26.7%; VAWA self-petitions 38.3%) <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/>;

⁹ John Morton, Immigration and Customs Enforcement, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011) <http://niwaplibrary.wcl.american.edu/pubs/discretion-victims-witnesses-plaintiffs/>; For a full discussion of how VAWA confidentiality laws and implementing policies have been designed to prevent detention and removal of victims, *see*, Alina Husain and Leslye E. Orloff, VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy (March 11, 2017) available at <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>

¹⁰ For a full discussion, *see* Jane Anderson, Benish Anver, *What's Immigration Status Got to do with It? Prosecution Strategies for Cases Involving Undocumented Victims*, available at: <http://niwaplibrary.wcl.american.edu/pubs/pretrial-strategies-7-1-17-final-with-logos>

¹¹ As the name suggests, the testimony at trial must be consistent with the prior statements. Note, the testimony does not need to be exact, *see United States v. Vest*, 842 F.2d 1319, 1329 (1st Cir. 1988) finding that a prior consistent statement need not be identical in every detail to the declarant's testimony at trial because, "Inevitably, witnesses' recollections of past events will diverge."