Chevron doctrine and U visa certification

By Rafaela Rodrigues and Leslye E. Orloff
April 2, 2019 (Updated June 12, 2021)

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

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

---

3 8 CFR § 214.14
8 *Id.* at 223.
9 INA sec. 214(p)(1), 8 U.S.C. 1184(p)(1) (“The petition filed by an alien under section 1101(a)(15)(U)(i) of this title shall contain a certification from a Federal, State, or local law enforcement official, prosecutor, judge, or other Federal, State, or local authority investigating criminal activity described in section 1101(a)(15)(U)(iii) of this title[. . .].”) 10 8 C.F.R.214.14(c)(2)(i)

National Immigrant Women’s Advocacy Project (NIWAP, pronounced new-app)
American University, Washington College of Law
4300 Nebraska Avenue, N.W., N100B, Washington, D.C. 20016
(o) 202.274.4457 · niwap@wcl.american.edu · wcl.american.edu/niwap · http://library.niwap.org/

This publication was developed under grant number SJI-20-E-005 from the State Justice Institute. The points of view expressed are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.
certifying official, including a judge, signs a U visa certification that document informs DHS that
the immigrant applicant is a victim of a listed criminal activity and describes how the victim is
being, has been or is likely to be helpful to the court, law enforcement, prosecutors or other
government officials in detection, investigation, prosecution, conviction or sentencing the criminal
activity.\textsuperscript{12} Obtaining a U visa certification is a required prerequisite to filing a U visa immigration
case.\textsuperscript{13} The certification does not grant the victim immigration status,\textsuperscript{14} but rather provides evidence
for DHS to consider in its adjudication of the victim’s U visa application. The Department of
Homeland Security (DHS) has sole authority to grant or deny a U visa.\textsuperscript{15} To obtain a U visa, a
victim must meet eligibility requirements that go beyond, obtaining the required U visa
certification.\textsuperscript{16}

There have been discussions about whether in the future the U.S. Supreme Court might limit
or restrict the application of the \textit{Chevron} doctrine.\textsuperscript{17} Potential changes may include less freedom for
agency action, increasing the role of courts in some complex areas of regulation and restricting the
discretionary power of agencies to adjust policies\textsuperscript{18}, or restricting the areas where \textit{Chevron} doctrine
should be applied.\textsuperscript{19} None of the potential limitations being discussed would change the fact that
under the federal U visa statute\textsuperscript{20} and under DHS regulations and policies state, federal and local
judges are authorized to sign U visa certifications. The statute is not silent or ambiguous regarding
the fact that judges can sign U visa certifications. As a result, should any of the proposed changes to
\textit{Chevron} deference become law, it is highly unlikely that such change would alter current regulatory
procedures implementing the statutorily created judicial authority to sign U visa certifications, since
the statute is clear on this particular issue.

\textsuperscript{12} See LESLYE E ORLOFF ET AL., U VISA QUICK REFERENCE FOR JUDGES (2018).
\textsuperscript{13} 8 C.F.R.214.14(c)(2)(i)
\textsuperscript{14} DEPT. OF HOMELAND SECURITY, supra note 5 at 8.
\textsuperscript{15} Id. at 8.
\textsuperscript{16} New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status 72 Fed. Reg.
\textsuperscript{17} Amanda Reilly, \textsc{Would Kavanaugh Limit the Chevron Doctrine?} Green Wire (2018),
https://www.eenews.net/stories/1060088675 (last visited Apr 1, 2019); Eric Citron, \textsc{The Roots and Limits of
Gorsuch’s Views on Chevron Deference} SCOTUSBlog (2017), https://www.scotusblog.com/2017/03/roots-limits-
gorsuchs-views-chevron-deference/ (last visited Apr 1, 2019); Joey Longley, \textsc{Gorsuch Opinion in Epic Systems
Expresses Openness to Re-examination of Chevron National Consumer Law Center} (2018),
\textsuperscript{18} Epic Systems Corp. v. Lewis, 138 U.S. 1612, 1630 (2018). See Joey Longley, \textsc{Gorsuch Opinion in Epic
Systems Expresses Openness to Re-examination of Chevron National Consumer Law Center} (2018); Eric
Citron, \textsc{The Roots and Limits of Gorsuch’s Views on Chevron Deference} SCOTUSBlog (2017),
\textsuperscript{19} Reilly, supra note 17.
\textsuperscript{20} INA sec. 214(p)(1), 8 U.S.C. 1184(p)(1) (permitting judges to sign certifications on behalf of U nonimmigrant
status applications).