

Expanding Designation Authority to Include “Subject-Matter Experts”

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Proposed Language

We propose the following changes to the current definition of “certifying official:”¹

The head of the certifying agency, ~~or~~ any person(s) in a supervisory role, **or a subject matter expert** who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or a Federal, State, or local judge...

In addition, we also propose preamble language explaining the training and expertise that would be appropriate to qualify as a “subject matter expert.”

Background:

Congress expressly created the U visa classification to achieve dual purposes: to “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence,” and to protect victims.² A U visa applicant must show that s/he “has suffered substantial physical or mental abuse as a result of having been a victim of qualifying criminal activity.”³ S/he must “possess credible and reliable information establishing that . . . she has knowledge of the details concerning the qualifying criminal activity upon which . . . her petition is based.”⁴ She must demonstrate that she “has been helpful, is being helpful, or is likely to be helpful to a certifying agency in the investigation or prosecution of the qualifying criminal activity upon which . . . her petition is based.”⁵ Finally, the criminal activity must have violated a law of the United States.⁶

¹ “The head of the certifying agency or any person(s) in a supervisory role who has been specifically designated by the head of the certifying agency to issue U nonimmigrant status certifications on behalf of that agency, or a Federal, State, or local judge... USCIS believes that this definition is reasonable and necessary to ensure the reliability of certifications. It also should encourage certifying agencies to develop internal policies and procedures so that certifications are properly vetted.” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. No. 179, 53023 (Sept. 17, 2007).

² Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, § 1513, 114 Stat. 1464, 1533 (2000) (“The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(u)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”); *see also* Gail Pendleton, *Winning U Visas After the Regulations*, LEXISNEXIS EMERGING ISSUES ANALYSIS, Jan. 2008, at 1, 2. (“Most importantly, practitioners must understand that the U [visa] has a dual purpose. Congress intended it both to provide humanitarian relief to victims of crime and to help enforcement attempting to investigate and prosecute the crimes against this most vulnerable population.”).

³ 8 C.F.R. § 214.14(a)(14)(3)(b)(1) (2009).

⁴ 8 C.F.R. § 214.14(a)(14)(3)(b)(2) (2009).

⁵ 8 C.F.R. § 214.14(a)(14)(3)(b)(3) (2009).

⁶ 8 C.F.R. § 214.14(a)(14)(3)(b)(4) (2009).

The U visa statute positions the certification from local, state or federal law enforcement as a threshold component of the U visa application.⁷ Thus, the statutory framework requires advocacy at two separate junctures—first to petition law enforcement to sign a certification, and second to petition USCIS for U visa relief.⁸

Prior to the issuance of the 2007 U visa interim final rule, law enforcement personnel issued certifications following USCIS’s informal guidance and departmentally generated internal procedures to varying degrees of success.⁹ These interim protocols were largely ad hoc and inconsistent, rendering the implementation complex and time-consuming.¹⁰ Some jurisdictions distorted the legal standard or refused to issue certifications altogether.¹¹ Several jurisdictions, however, developed a strong and successful partnership with the immigrant community because the interim relief period was largely unburdened by law enforcement hierarchy and bureaucracy.¹² Law enforcement officials with actual knowledge of the investigation were eligible to provide certification, regardless of rank or status.¹³

In order to create consistency and accountability, in September 2007, USCIS published the U visa interim final rule, which, among other things, established new certification procedures and necessarily altered the “interim relief period” protocols.¹⁴ The most significant regulatory change to the certification requirement was the “agency head” requirement, which was not in the BIWPA.¹⁵ The interim final rule expressly required the certifying official be either the head of the qualifying agency or a supervisor designated by the head.¹⁶ While USCIS intended to leave the definition of “certifying official” in the U visa regulations open to broader interpretation, it also wanted to uphold the objectives behind the certification requirement: (1) deterrence of frivolous claims, (2) protection against fraud, and (3) quality assurance.

The problem is that in practice, the current definition of “certifying official,” including only heads of qualifying agencies and supervisors designated by those heads, restricts law enforcement and prosecuting officials by being tied to law enforcement hierarchy. The current definition is applied arbitrarily because of the rigid meaning of supervisors in law enforcement and criminal justice.

⁷ 8 U.S.C. § 1184(p)(1) (2006) (stating that certification from local, state, or federal law enforcement must show that the petitioner “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of qualifying criminal activity”).

⁸ Jamie R. Abrams, *The Dual Purposes of the U Visa Thwarted in a Legislative Duel*, 29 ST. LOUIS U. PUB. L. REV. 373, 381 (2010).

⁹ *Id.* at 383.

¹⁰ *Id.* at 384.

¹¹ *Id.* at 387.

¹² *Id.* at 384-85.

¹³ *Id.* at 385 (“During this lengthy interim relief period, petitioners were generally able to obtain certifications directly from individual officers with specific knowledge of their cases. Knowledgeable personnel included both trained domestic violence advocates within the law enforcement community and officers with knowledge of the relevant criminal activity and the individuals involved”).

¹⁴ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (Sept. 17, 2007). USCIS promulgated these interim regulations pursuant to a provision of the APA excepting the need for public comment before a rule takes effect where public comment would be “impracticable and contrary to the public interest. *Id.* at 53,032 (explaining that the Administrative Procedure Act (APA) allows for an exception to the requirements for soliciting public comment before a rule takes effect when the agency finds a compelling public need for rapid implementation of the rule; the USCIS found that delaying the implementation in order to take public comment would be “impracticable and contrary to the public interest” and therefore the promulgation of the rule without public comment was justified).

¹⁵ 8 U.S.C. § 1184(p)(1) (2006).

¹⁶ 8 C.F.R. § 214(a)(3) (2009).

Both for law enforcement officials and prosecutors, the supervisor requirement has a distinct meaning and has nothing to do with expertise on a particular subject matter. A person in a supervisory role means someone with a rank (e.g. a captain) or an individual who is part of the command structure, but who is not necessarily the most qualified person to certify. Supervisors are not chosen based on their subject matter expertise; rather, they rely upon and supervise law enforcement personnel and prosecutors who are assigned to special cases or units and thereby have accumulated subject matter expertise.

As law enforcement, prosecutors and courts have learned over the years, effective justice system intervention in violence against women cases requires specialized training, expertise, experience and community relationships. The officers with specialized training working in domestic violence, sexual assault, human trafficking or special victims units are in many communities the best certifiers. Certification requires many of the same skills and knowledge that officers serving in these specialized units employ every day. Supervisors do not necessarily have these skills, unless they rose out of the ranks of officials that served in one of these specialized units.

In proposing expansion to the designation authority, Chief, Sheriff or agency heads will have flexibility and discretion to designate officials who are most appropriate and qualified to sign U visa certifications. (Attached please find the view of several law enforcement leaders advocating for broader authority in designating U visa certifiers).

Field Research Supports Expanding the Definition of “Certifying Officials”

In a 2013, NIWAP conducted a nationwide survey of organizations serving immigrant victims of violence, with part of the survey focusing on the Department of Homeland Security (DHS)’s requirement that all certifiers must be either head of the agency or individuals in supervisory roles.¹⁷ More than half of 272 responding agencies (54.4%, n=148) felt that the supervisory requirement for certifiers hindered a victim’s ability to obtain certification.

Survey participants were then asked to explain in depth how the supervisory requirement hindered the certification process. Out of the 98 explanations received, over half (55.10%) stated that the supervisor is often disconnected from the case and/or lacks knowledge about U visa relief; 23.4% noted confusion about the supervisor requirement; and 19.4% expressed problems with having a supervisor available to certify.

An impressive 79.9% (n=213 of 267) of survey participants believe that the ability for the head of the agency to designate certification to a non-supervisor would increase access to U visa certifications for immigrant crime victims. Some of the respondents (n=98) further reasoned that U visa certifications would increase because non-supervisory designees often have more knowledge of the victim and the case to properly access helpfulness and cooperation (40%), and because non-supervisory designees also have increased knowledge of the U visa requirements (22.4%). Survey participants (n=98) also suggested that expanding law enforcement leadership’s certifying authority would translate into increased availability of certifiers (19.4%) and would expedite the certification process (14.2%).

¹⁷ Natalia Lee, Daniel J. Quinones, Nawal Ammar & Leslye E. Orloff, *National Survey Of Service Providers On Police Response To Immigrant Crime Victims, U Visa Certification And Language Access*, NIWAP, available at <http://niwaplibrary.wcl.american.edu/reference/additional-materials/immigration/u-visa/research-reports-and-data/Police-Response-Survey-Report-FINAL-bja.pdf/view?searchterm=national%20survey%20of%20service%20providers>.

Parallel Precedents

There are numerous examples in legislations and policy statements where the government has elaborated on what qualities, training, and experiences are appropriate to establish subject-matter expertise in the context of domestic violence, dating violence, sexual assault, stalking, elder abuse, or human trafficking.

a) Violence Against Women Act (VAWA) 2013

- *Grant eligibility requirements to provide legal assistance for victims:*
... (A) has demonstrated expertise in providing legal assistance to victims of domestic violence, dating violence, sexual assault, or stalking in the targeted population; or (B)(i) is partnered with an entity or person that has demonstrated expertise described in subparagraph (A); and (ii) has completed, or will complete, training in connection with domestic violence, dating violence, stalking, or sexual assault and related legal issues, including training on evidence-based risk factors for domestic and dating violence homicide.¹⁸
- *Definitions of “victim service provider” and “victim services”*
(43) “victim service provider” means an organization ... that assists or advocates for domestic violence, dating violence, sexual assault, or stalking victims, including domestic violence shelters, faith-based organizations, and other organizations, with a documented history of effective work concerning domestic violence, dating violence, sexual assault, or stalking.
(44) “victim services” mean services provided to victims of domestic violence, dating violence, sexual assault, or stalking, including telephonic or web-based hotlines, legal advocacy, economic advocacy, emergency and transitional shelter, accompaniment and advocacy through medical, civil or criminal justice, immigration, and social support systems, crisis intervention, short-term individual and group support services, information and referrals, culturally specific services, population specific services, and other related supportive services.¹⁹

b) 1997 Immigration and Naturalization Service (INS) memo

While centralizing 1-360 [self-petition] adjudications was motivated in part by the goal of having a small corps of officers well-trained in domestic violence issues... The nature of domestic violence and the sensitivity needed in dealing with victims are topics to which few INS officers will have had exposure. District offices are strongly encouraged to identify two or more officers (depending on the size of the district) to handle all adjustments following from I-360 [self-petition] approvals. The designated officers should have the experience, discretion and communications skills to be able

¹⁸ 42 U.S.C. § 3796gg-6(d)(1).

¹⁹ 42 U.S.C. § 13925(a)(43) and (44)

to balance sensitivity in dealing with true victims with vigilance against fraud...²⁰

c) Family Violence Prevention and Services Act (FVPSA)'s expertise requirement:

[The appropriately trained designee] shall, prior to such appointment, have expertise in the field of family violence and domestic violence prevention and services and, to the extent practicable, have expertise in the field of dating violence.²¹

d) Office of Violence against Women (OVW) creation statute:

[Linking at-risk juveniles] with responsible individuals (such as law enforcement officials, Department of Defense personnel, individuals working with local businesses, and individuals working with community-based and faith-based organizations and agencies) who are properly screened and trained.²²

e) Civil Protection Orders: A guide for Improving Practice (burgundy book):

- Expand expertise by receiving ongoing training in the dynamics of domestic violence, firearms restrictions, full faith and credit, and other issues related to protection order issuance and enforcement.²³
- [Implementing] regular cross-training for advocates and other professionals on the dynamics of domestic violence, the role of system professionals, and a wide range of topics such as firearms laws and full faith and credit.²⁴
- Seek ongoing training on domestic violence and become knowledgeable of behaviors that pose higher risk for victims, such as stalking and sexual abuse.²⁵
- [Educated] about the effects of exposure to violence on children and the effects of coercive and controlling behaviors on parenting.²⁶
- Develop the expertise necessary to provide competent assistance to victims of domestic violence and establish relationships with local and national resources.²⁷
- ...obtain training on safety planning...²⁸
- Coordinate joint training with other law enforcement agencies, including campus, tribal, and federal law enforcement, U.S. Attorneys' offices, and state attorneys' general offices

²⁰ Paul Virtue, then-Acting Executive Associate Commissioner of the INS, "Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues," May 6, 1997, available at: http://niwaplibrary.wcl.american.edu/immigration/vawa-self-petition-and-cancellation/government-memoranda-and-factsheets/VAWA_INSOP%20VAWA%20Self-Petition%20memo_5.6.97_OVW_3.31.09.pdf/view?searchterm=vermont%20service%20center.

²¹ 42 U.S.C. § 10404(b)(1)

²² 42 U.S.C. § 5651(a)(4); 42 U.S.C.A. § 5633(a)(9)(G)

²³ Emily Meyer et al., *Civil Protection Orders: A guide for Improving Practice*, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, 35 (2010), available at: http://www.ncjfcj.org/images/stories/dept/fvd/pdf/cpo_guide.pdf.

²⁴ *Id.* at 63.

²⁵ *Id.* at 69.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 70.

on laws and issues related to domestic violence, including firearms and the federal domestic violence crimes.²⁹

- Cross-training on technology and abuse is important. For example, advocates can work with specialized law enforcement and prosecution units to ensure they understand the ways perpetrators use technology. Law enforcement, prosecutors, and courts can benefit from additional training on technology and access to a technology crime unit.³⁰

Suggested Preamble Language:

Expanding the U visa certifier definition allows non-supervisory law enforcement personnel to sign U visa certifications based on their expertise, experiences, and connection to the victim. It also ensures liability of the U visa certifications because agency leadership will strategically select the person designated as a subject matter expert based on the following factors:

- Expertise on immigration issues, domestic violence dynamics, sexual assault, child abuse, elder abuse, human trafficking, and working with other specialized victim populations;
- Documented experiences of working with female victims, minor victims, trafficking victims, victims of gender-based crimes, elder abuse victims, reluctant victims, or victimless prosecutions;
- Completion of specialized training in connection with domestic violence, dating violence, stalking, sexual assault, and working with Limited English Proficiency individuals and/or immigrant populations;
- Documented experiences of providing outreach to or work with community-based programs and organizations that serve domestic abuse victims, sexual assault survivors, immigrant victims of violence and/or trafficking;
 - Examples: services provided through working in shelters (e.g. as a caseworker); working for telephonic or web-based hotlines; providing safety planning, crisis intervention, short-term individual and group support; coordinated community response.
- Documented experiences of providing legal assistance to victims of domestic violence, sexual assault, dating violence, stalking, elder abuse, child abuse,
 - Examples: experience with orders of protection, or accompaniment and/or legal advocacy through civil or criminal justice
- Good working relationships with immigrant community advocates and/or immigrant populations in their community
 - Bilingual and bicultural officers often have the trust of the immigrant community
- A designated subject matter expert's training and experience may vary significantly based on the size of the agency, how busy the agency is, and other factors such as urban versus rural agency

Conclusion

The U visa is a valuable immigration relief for immigrant victims of crimes and it is also a crucial crime-fighting tool for law enforcement officials and district attorneys. Ensuring that designated certifiers include head of agencies, designated supervisors, or designated subject matter experts with the requisite

²⁹ *Id.* at 123.

³⁰ *Id.* at 168.

training and experience and without regard to that official's actual rank or title, improves law enforcement's ability to serve and protect the immigrant populations that reside in their communities.