



## JUDICIAL TRAINING & EDUCATION UPDATE

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### IMMIGRANT CRIME VICTIMS & U-VISA CERTIFICATION What is it and Why Should Judges Care?

#### Ten facts that every judge (and attorney/officer) should know

**THE PURPOSE FOR THIS UPDATE:** In every judge's career there will likely come a time when they are asked to sign a U-visa certificate on behalf of a noncitizen crime victim. The decision whether or not to sign the U-visa certificate is completely subject to the judge's discretion. However, in order to intelligently exercise that discretion the reviewing judge, at a minimum, should be familiar with the following 10 facts regarding this Federal program. In addition to judges, Congress also included law enforcement officers and prosecutors on the list of persons authorized to sign U-visa certificates. To answer the obvious question "Why did Congress include Judges on the list?" make sure you read Fact # 5, on pages 2 and 3.

**1) What is the U-Visa Certification Program?** In 2000, Congress created the U-visa under the [Violence Against Women Act \(VAWA\)](#) as a form of relief for immigrant victims of criminal activities.

- The U-visa is a temporary visa for noncitizen crime victims who are willing to cooperate with law enforcement in the detection, investigation, prosecution, conviction or sentencing of that criminal activity.
- Congress knew that without some form of immigration status that protects immigrant crime victims, few undocumented victims are willing to assist in detection, investigation or prosecution efforts.
- Thus, Congress provided a specific avenue for immigrant crime victims to obtain temporary lawful immigration status.
- The U-visa program encourages noncitizen victims to report criminal activity by protecting them from deportation and provides safety to the community by holding abusers accountable for criminal activity that might otherwise go undetected.

**2) Dispelling a Common Judicial Myth:** Some judges are reluctant to sign a U-visa certificate out of fear that by doing so they are changing the victim's legal immigration status. That is a MYTH.

- By signing a U-visa certificate on behalf of a noncitizen crime victim, the signing judge is NOT conferring legal immigration status upon a noncitizen applicant and is NOT making a determination of the applicant's eligibility for a U-visa.
- The certification is limited to a verification that the individual is a victim of a qualifying criminal activity and that s/he has been helpful in the detection, investigation, conviction or sentencing of that activity.
- The U-visa certificate is only one of several statutory requirements that a noncitizen crime victim must satisfy before a highly trained specialized unit within DHS can grant U-visa status. (See §3 below).

**3) How Does a Noncitizen Crime Victim Qualify for a U-Visa?** To qualify for a U-visa, an applicant must submit a petition ([Form I-918](#)) demonstrating that s/he meets each of the following 5 requirements:

1. The applicant must have been a victim of a U-visa listed “qualifying criminal activity” (see §7 below);
2. The applicant must possess information concerning such criminal activity;
3. The applicant must be helpful, have been helpful, or be likely to be helpful in the detection, investigation, prosecution, conviction or sentencing of a crime (see §8 below);
4. The criminal activity occurred in the United States or violated the laws of the United States; and
5. The applicant must have suffered substantial physical or mental abuse as a result of having been the victim of certain “qualifying criminal activity”.

In addition to the above five requirements, the U-visa applicant must also obtain a certification ([Form I-918 Supplement B](#)) signed by **a judge, law enforcement official, prosecutor or other approved certifying official**.

**4) By Signing a U-Visa Certification, What is the Judge, Officer or Prosecutor Certifying?**

- (1) their identity;
- (2) their position;
- (3) the alien’s status as a victim of “qualifying criminal activity” that the certifying agency is detecting, investigating, prosecuting, convicting or sentencing. (see §7 below);
- (4) the alien’s possession of knowledge concerning the qualifying criminal activity;
- (5) the alien’s helpfulness in the investigation or prosecution of the qualifying criminal activity; and
- (6) the location of the qualifying criminal activity.

A “certifying official” includes the law enforcement agency, prosecutor, or federal or **state judge** “that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity.” Recognizing that judges do not participate in investigations and prosecutions, USCIS interprets the term “investigation and prosecution” to include “detection, conviction and sentencing.” 8 CFR 214.14(a)(5).

**5) If Prosecutors & Law Enforcement Officials Can Sign U-Visa Certifications, Why Include Judges?**

**Criminal Cases:** In criminal cases, the agencies that most commonly certify a U-visa petition are local, state, and federal police departments and prosecutors. Although judges are authorized signers, many may choose not to do so in order to avoid a showing of bias for the prosecution, at least until the defendant is convicted and sentenced or the case is otherwise completed.

**Civil and Family Cases:** In civil court cases, judges are in a unique position to detect U-visa qualifying criminal activity due to their exposure to cases that involve issuance of civil protection orders, divorce, custody, child or spousal support and child abuse and neglect cases.

For example, where domestic violence is involved, victims might seek a protection order as a civil remedy in family court. In most states, the underlying activity that permits the issuance of the civil protection order is a criminal activity. The detection of this criminal activity by the family court judge issuing the civil protection order would enable the judge to act as a certifying official for a U-visa applicant.

**A Judge May Be The Only Certifying Official With Whom The Victim Will Encounter:** Immigrant victims of crime face unique barriers in accessing the criminal justice system for safety, especially those with limited English proficiency. Judges are included as certifiers based, in part, on the understanding that language barriers prevent some immigrant victims from successfully communicating with law enforcement officials when trying to report crimes.

A judge may be the first authorized certifying official to detect the existence of underlying criminal activities through testimony, pleadings, emergency orders, or motions during civil proceedings. An increasing number of states require courts to provide interpretation for parties with limited English proficiency. Thus, when a victim eventually gets to court, a judge may be the only certifying official with whom the victim will encounter that is both language accessible and able to “provide assistance.”

**Courthouse Recommendation:** For the above reasons, many courthouses provide DHS brochures regarding immigration relief for immigration crime victims. See the USCIS website at <http://www.uscis.gov/tools/humanitarian-benefits-based-resources/resources-victims-human-trafficking-other-crimes>.

#### **6) In Civil Cases, If U-Visa Criminal Activity is Detected, How Proactive Should a Judge Be?**

No one expects a judge to provide direct assistance to a noncitizen crime victim with the U-visa application process. However, if a judge detects U-visa qualifying criminal activity, the court could refer the crime victim to the appropriate law enforcement agency, prosecuting authority or a local/state domestic violence organization with knowledge of the U-visa application process, such as the [Minnesota Coalition for Battered Women \(MCBW\)](#) at 651-646-6177. Depending on the circumstances, especially in the absence of law enforcement or prosecution involvement, a subsequent request to sign a U-visa certification may be submitted to the court informally (sometimes by mail) or presented to the court in the form of a motion.

#### **7) What is Considered “Qualifying Criminal Activity” for U-Visa Certification Purposes?**

A “non-exclusive” list of qualifying criminal activities includes rape, torture, trafficking, incest, **domestic violence**, sexual assault, abusive sexual contact, prostitution, sexual exploitation, stalking, female genital mutilation, being held hostage, peonage, involuntary servitude, slave trade, kidnapping, abduction, unlawful criminal restraint, false imprisonment, blackmail, extortion, manslaughter, murder, felonious assault, witness tampering, obstruction of justice, perjury, fraud in foreign labor contracting, solicitation to commit any of the above-mentioned crimes, or *any similar activity* in violation of federal, state, or local criminal law. This list also includes attempts or conspiracy to commit any of the listed activities.

**NOTE:** The term “criminal activity” in the statutory language was intentionally chosen by Congress to take into account “the wide variety of state criminal statutes in which the terminology used to describe the criminal activity may not be identical to that found on the statutory list, although the nature and elements of both criminal activities are comparable.”

For example, the statute lists domestic violence as a U-visa qualifying crime. However, most states do not specify domestic violence as a crime, but instead list crimes that constitute domestic violence, such as harassment, assault, child abuse, elder abuse or stalking. Even though these crimes are not specifically enumerated in the U-visa, they are incorporated within the qualifying crime of “domestic violence.”

**8) How Do You Assess a Victim's "Helpfulness" For U-visa Certification Purposes?**

The certification signed by the judge or other certifying official demonstrates that the applicant *"has been helpful, is being helpful or is likely to be helpful in the investigation or prosecution of the qualifying criminal activity."* Judges need only assess the helpfulness using the same standard the judge uses in making probable cause determinations. DHS advises that certification be granted on "any credible evidence," which is parallel to probable cause.

The U-visa helpfulness requirement is interpreted broadly to include "victim assistance" in the detection, investigation, prosecution, conviction or sentencing of the criminal activity. Unfortunately, the law does not specifically define what is meant by "helpful." However, USCIS provides a few guidelines to agencies certifying U-visa applications. Some examples of helpful actions include, but are not limited to:

- (1) the victim calling 911 to report the crime,
- (2) the victim providing a statement to the police,
- (3) filing a police report,
- (4) victim currently assisting law enforcement, or
- (5) victim sought a civil protection order, that the victim can enforce if violated in the future.

(Judges who have victims before them for civil protection orders should note that this limited interaction with victims is enough for judges to act as certifiers.)

**9) What is NOT Required for U-Visa Certification?**

U-visa status does not require the actual initiation of a law enforcement investigation nor does it require a successful prosecution or victim testimony. In some cases, investigation or prosecution of criminal activity is impossible because of an inability to locate an offender or the offender being deported prior to the investigation or prosecution of a case.

If a U-visa petitioner assisted or cooperated with an investigation or prosecution, an approved certifier may prepare the certification even if detection, investigation or prosecution efforts are abandoned or did not result in conviction. The discretion that investigators and prosecutors have to investigate or prosecute criminal activity does not negate the assistance, cooperation, and helpfulness that a victim may have provided regarding that activity.

**10) What is the Practical Effect of Obtaining a U-Visa for a Noncitizen Crime Victim?**

U-visa status is temporary and is issued for a period of up to four years. A U-visa holder can live and work legally in the United States and include certain family members in the U-visa petition.

After three years of continuous presence in the U.S., a U-visa holder is eligible to apply for adjustment of status to lawful permanent resident status. Not all U-visa holders will qualify for lawful permanent residency. To qualify, a U-visa holder applying for lawful permanent residency must also provide evidence that s/he has not unreasonably refused to provide reasonably requested assistance in the criminal investigation or prosecution and that his or her continuous presence in the country is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest.

**Judicial Ethics – Are There Any Ethical Concerns With a Judge Signing a U-Visa Certification?**

**QUESTION:** Does the [Minnesota Code of Judicial Conduct \(“Code”\)](#) permit a judge to sign a U-visa certificate (form I-918B) certifying that a alien has been helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of a criminal activity of which he or she is a victim? If the Code does permit such certifications, are there circumstances in which the judge should not sign an I-918B form?

**ANSWER:** On June 26<sup>th</sup>, 2015, the Minnesota Board on Judicial Standards adopted [Advisory Opinion 2015-2](#) in which the Board answered the above question by stating:

1. In the Board’s opinion, the Code does not generally prohibit a judge from signing a U-visa certification ([form I-918B](#)), however;
2. A judge may not sign a certification when a judge does not have an adequate basis for the averments made in the certification;
3. A judge should disclose the certification to the parties to the case;
4. Because Federal law does not appear to contemplate certification by a judge who is not assigned to the case, the Board recommends against it. However, *“There may be unusual circumstances in which such a certification could be proper, e.g., when the prosecutor is unavailable to sign the certification, there has been a conviction, and the presiding judge is incapacitated. In most instances, however, the Board recommends that a judge who is not responsible for a case involving the U-Visa petitioner decline to sign a certification.”* Advisory Opinion 2015-2, page 8.

Note: According to the Department of Homeland Security (DHS), the U.S. Citizenship & Immigration Services (USCIS) does accept certifications signed by judges who were not assigned to the case when the judge has knowledge of the case by reviewing the record or consulting with the judge who heard the case.

5. In all other civil or criminal cases, whether or not a judge decides to sign a U-visa certificate is an issue of law and does not implicate the ethics Code.

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## CONTACTS

### If a Judge Has Questions About U-Visa Certification, Who Can Provide Guidance?

1. Government agencies, law enforcement or entities with questions should contact USCIS Vermont Service Center, [UTVAWA.vsc@uscis.dhs.gov](mailto:UTVAWA.vsc@uscis.dhs.gov), Hotline: 802-527-4888. Certifiers may also call the Office of Policy and Strategy at 202-272-1470.
2. The National Immigrant Women’s Advocacy Project at American University Washington College of Law has authored a 63 page [U Visa Certification Tool Kit for Federal, State and Local Judges and Magistrates](#), (last updated on Feb. 3, 2014); The Toolkit was developed under a grant from the State Justice Institute.
3. The answer to most questions about the U-visa certification program can be found in the Toolkit. This publication along with additional information about U-visa certification can be found at the Immigration and U-visa Resource Library at <http://niwaplibrary.wcl.american.edu/> (click on “Immigration” tab).
4. For judges seeking technical support or consultation, please contact the [National Immigrant Women’s Advocacy Project \(NIWAP\)](#) at [niwap@wcl.american.edu](mailto:niwap@wcl.american.edu) or call (202) 274-4457 to receive technical support from U visa certification experts including law enforcement experts on U-visa certification.