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Date: September 29, 2019

RE: U Visa Law Enforcement Resource Guide (August 2019)

Introduction

The National Women’s Advocacy Project (NIWAP) is writing on behalf of law enforcement, prosecutors, and judicial officials who have expertise on the U Visa program, its legislative and regulatory history, and its purpose. We are writing to express our significant concerns about the U Visa Law Enforcement Resource Guide (“2019 Guide”) issued by the United States Citizenship and Immigration Services (USCIS) in August of 2019. We seek confirmation that the 2019 Guide is a USCIS document that co-exists with, cannot, and does not supersede the November 2015 “U and T Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies” (2015 Resource Guide). The 2015 Resource Guide was fully vetted with all U.S. Department of Homeland Security (DHS) components and was issued by DHS as a whole. Further, the 2019 Guide was issued without stakeholder consultation or input from U visa experts in law enforcement, prosecutor’s offices, or judges who sign U visa certifications and can provide DHS with information about how the U visa program has served as an effective crime fighting tool, led to more successful prosecutions, and enhanced access to justice in family, civil, and criminal courts.

We request that DHS and USCIS convene a meeting to obtain feedback from certifying officials and U visa experts in the field. The law enforcement officials, judges, prosecutors, and other certifiers listed in Attachment C should all receive invitations to participate and provide feedback on the 2019 Guide. After consulting with certifying officials and U visa experts, the 2019 Guide Resource Guide should be revised to be consistent with the U visa statute, U visa regulations, and the legislative and regulatory history and purpose of the U visa program.

In this memo we will discuss several of the ways in which the 2019 Guide adopts an approach that is contrary to and designed to undermine the purpose and effectiveness of the U visa program and the strides the program has made in holding perpetrators accountable and

improving law enforcement officer, community, and victim safety.¹ First, we will discuss the U visa statute that was created in the Violence Against Women Act of 2000 with bi-partisan support and which was improved and expanded in VAWA 2005 and VAWA 2013. Next, we discuss the U visa regulations (2007) and the T and U adjustment of status regulations (2008) and how they implemented the U visa program consistent with its legislative history and propose. Later we discuss the many ways in which the 2019 Guide takes positions that are inconsistent with the U visa regulations by omitting or deemphasizing key aspect of the U visa statute and regulations. Throughout this discussion of the 2019 Guide we highlight ways in which it creates obstacles that undermine the ability of U visa certifying agencies to detect, investigate, and prosecute perpetrators of criminal activities and of prosecutors and courts to convict and sentence perpetrators.

Ensuring That Implementation of the U Visa Program Remains Consistent With Its Legislative History and Purpose

In a number of ways, the 2019 U Visa Resource Guide is inconsistent with DHS’s statutory obligation to implement the U visa program in a manner that furthers the bi-partisan legislative history and goals of the U visa program. This section of the memo provides quotations from the U visa statute and from legislative history that set out what Congress sought to accomplish in creating and improving the U visa program in VAWA 2000, 2005, and 2013. the 2019 U Visa Resource Guide needs to be reviewed and amended to be fully consistent with this legislative history and goals.

Section 1502 of the Violence Against Women Act of 2000 (VAWA 2000) set out findings that applied to all of the immigration provisions included in VAWA 2000.

“SEC. 1502. Findings and Purposes²

(a) FINDINGS--Congress finds that--

(1) the goal of the immigration protections for battered immigrants included in the Violence Against Women Act of 1994 was to remove immigration laws as a barrier that kept battered immigrant women and children locked in abusive relationships;

(2) providing battered immigrant women and children who were experiencing domestic violence at home with protection against deportation allows them to obtain protection orders against their abusers and frees them to cooperate with law enforcement and prosecutors in criminal cases brought against their abusers and the abusers of their

¹ Victim Services Committee, *Support for Education and Awareness on U Visa Certifications and T Visa Declarations*, International Association of Chiefs of Police (November 2018).

² Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, §1502(a), 114 Stat 1464 (2000) (hereinafter “VAWA 2000”).

children without fearing that the abuser will retaliate by withdrawing or threatening withdrawal of access to an immigration benefit under the abuser's control; and

(3) there are several groups of battered immigrant women and children who do not have access to the immigration protections of the Violence Against Women Act of 1994 which means that their abusers are virtually immune from prosecution because their victims can be deported as a result of action by their abusers and the Immigration and Naturalization Service cannot offer them protection no matter how compelling their case under existing law.

(b) PURPOSES.³—The purposes of this title are—

(1) to remove barriers to criminal prosecutions of persons who commit acts of battery or extreme cruelty against immigrant women and children; and

(2) to offer protection against domestic violence occurring in family and intimate relationships that are covered in State and tribal protection orders, domestic violence, and family law statutes.”

Congress created the U Visa as a crucial component of VAWA 2000 with the goal of offering protections that flow from access to legal immigration status and protection from deportation to immigrants who are victims of the types of crimes that VAWA and the Trafficking Victims Protection Act (TVPA 2000) were both explicitly designed to combat. Together VAWA and TVPA provided important tools under federal law that protect victims and strengthen the ability to hold accountable perpetrators of domestic violence, child/elder abuse, sexual assault, stalking and human trafficking using the criminal and civil justice systems. The U visa and T visa were designed to expand upon VAWA 1994 immigration protections to cover a range of crimes committed against vulnerable immigrant crime victims who are commonly women and children. When drafting the U visa statute,⁴ Congress included the following statutory history and purpose language:

SEC. 1512. PROTECTION FOR CERTAIN CRIME VICTIMS INCLUDING VICTIMS OF CRIMES AGAINST WOMEN.

(a) FINDINGS AND PURPOSE.—

(1) FINDINGS.—Congress makes the following findings:

(A) Immigrant women and children are often targeted to be victims of crimes committed against them in the United States, including rape, torture, kidnaping, trafficking, incest, domestic violence, sexual assault, female genital mutilation, forced prostitution, involuntary servitude, being held hostage or being criminally restrained.

³ *Id.*, § 1502(b), 114 Stat 1464.

⁴ *Id.*, § 1503.

(B) All women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of the crimes committed against them and the prosecution of the perpetrators of such crimes.

(2)PURPOSE.—

(A) The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement 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. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.

(B) 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.

(C) Finally, this section gives the Attorney General discretion to convert the status of such nonimmigrants to that of permanent residents when doing so is justified on humanitarian grounds, for family unity, or is otherwise in the public interest.

The Congressional Record of VAWA 2000 contains both section-by-section analysis of immigration protections included in VAWA 2000 and discussion by members of Congress about the goals of the U visa and VAWA 2000's immigration protections. Quotations from this legislative history reinforce and further explain what bi-partisan legislators intended the U visa, T visa, and VAWA immigration protections to accomplish.

VAWA “makes important revisions to the immigration laws to protect battered immigrant women....I am proud to have worked with the women’s groups in Utah and elsewhere in seeing that VAWA is reauthorized. With their help, we have been able to make targeted improvements to the original legislation that will make crucial services better and more available to women and children who are trapped in relationships of terror. I am proud of this achievement and what it will do to save the lives of victims of domestic violence.”⁵

⁵ 146 Cong. Rec. S10,191 (daily ed. Oct. 11, 2000).

Title V – Battered Immigrant Women

Strengthens and refines the protections for battered immigrant women in the original Violence Against Women Act. Eliminates a number of “catch 22” policies and unintended consequences of subsequent changes in immigration law to ensure that domestic abusers with immigrant victims are brought to justice and that the battered immigrants Congress sought to help in the original Act are able to escape the abuse.⁶

VAWA 2000 addresses residual immigration law obstacles standing in the path of battered immigrant spouses and children seeking to free themselves from abusive relationships that either had not come to the attention of the drafters of VAWA 1994 or have arisen since as a result of the 1996 changes to immigration law.⁷

“Sec. 1513. Protection for Certain Crime Victims Including Victims of Crimes Against Women

Creates new nonimmigrant visa for victims of certain serious crimes that tend to target vulnerable foreign individuals without immigration status if the victim has suffered substantial physical or mental abuse as a result of the crime, the victim has information about the crime, and a law enforcement official or a judge certifies that the victim has been helpful, is being helpful, or is likely to be helpful in investigating or prosecuting the crime.”⁸

“No person residing in the United States should be immune from prosecution for committing a violent crime because of a loophole in an immigration law.”⁹

“Of course, a comprehensive effort to reduce violence against women and lessen the harm it causes must do more than just arrest, convict and imprison abusers—we must also help the victims of violence. This legislation proposes to assist these crime victims in three fundamental ways: Providing a means for immediate protections from their abusers, such as through access to shelters; easier access to the courts and to the legal assistance necessary to keep their abusers away from them; and removing the “catch-22s” that sometimes literally compel women to stay with their abusers—such as discriminatory insurance policies that could force a mother to choose between turning in the man who is beating her or keeping health insurance for her children., Another “catch-22” affects immigrant women who are sometimes faced with a similar insidious “choice.” In 1994, we worked out provisions so battered immigrant women—whose ability to stay in the country was dependent on their husbands—would not have to choose between staying in this country and continuing to be beaten, or leaving their abusers, but in doing so have to also leave our country (perhaps even without their children). This bill fixes aspects of this problem that leave an abused woman with such a horrible, unfair and

⁶ *Id.* at S10,195.

⁷ *Id.*

⁸ *Id.* at S10,196.

⁹*Id.* at S10,223-24.

immoral choice”¹⁰

“One of the most important provisions in the bill is the Battered Immigrant Protection Act. This provision helps battered immigrants by restoring access to a variety of legal protections undermined by the 1996 immigration laws. The Violence Against Women Act passed in 1994 included provisions that allowed battered immigrants to apply for legal status without the cooperation of their abusers, and enabled victims to seek protective orders and cooperate with law enforcement officials to prosecute crimes of domestic violence.”¹¹

Unfortunately, the subsequent changes in immigration laws have reduced access to those protections. Thousands of battered immigrants are again being forced to remain in abusive relationships, out of fear of being deported or losing their children. The pending bill removes obstacles currently hindering the ability of battered immigrants to escape domestic violence safely and prosecute their abusers.”¹²

These and other important measures will do a great deal to protect battered immigrants and their children from domestic violence and free them from the fear that often prevents them from prosecuting these crimes. Congress enacted the Violence Against Women Act in 1994 to help all victims of domestic violence, regardless of their citizenship. It is long past time to restore and expand these protections.”¹³

“In 1994, we designed VAWA to prevent abusive husbands from using control over their wives’ immigration status to control them. Over the ensuing six years we have discovered additional areas that need to be addressed to protect immigrant women from abuse, and have attempted to do so in this legislation...With this legislation, battered immigrant women should not have to choose to stay with their abusers in order to stay in the United States ...I am pleased that we have taken these additional steps to protect immigrant women facing domestic abuse in the United States. I would also like to point out the difficult situation of immigrant women who face domestic violence if they are returned to their home country.”¹⁴

“And let’s not forget the plight of battered immigrant women, caught between their desperate desire to flee their abusers and their desperate desire to remain in the United States. A young Mexican woman who married her husband at the age of 16 and moved to the United States suffered years of physical abuse and rape—she was literally locked in her own home like a prisoner. Her husband threatened deportation if she ever told police or left the house. When she finally escaped to the Houston Area Women’s Center in Texas, she was near death. That shelter gave her a safe place to live, and provided her

¹⁰ 145 Cong. Rec. S444 (1999).

¹¹ 146 Cong. Rec. S10,170 (2000).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at S10,185.

the legal services she needed to become a citizen and get a divorce. Our bipartisan bill expands upon the protections for battered immigrant women.”¹⁵

“Finally, I [Senator ABRAHAM] am very pleased that the conference report includes the core provisions from the Senate bill that I developed along with Senator KENNEDY, Senator HATCH, and Senator BIDEN to address ways in which our immigration laws remain susceptible of misuse by abusive spouses as a tool to blackmail and control the abuse victim. The conference report follows the Senate VAWA reauthorization bill in building on the important work of VAWA 1994 in these areas. I will not describe all of the provisions of title V of division B of this bill, but I will discuss one of them, which I believe is the most important one. In this bill, we establish procedures under which a battered immigrant can take all the steps he or she needs to take to become a lawful permanent resident without leaving this country... Our legislation will give her the means to do so. Of all the victims of domestic abuse, the immigrant dependent on an abusive spouse for her right to be in this country faces some of the most severe problems. In addition to the ordinary difficulties that confront anyone trying to deal with an abusive relationship, the battered immigrant also is afraid that if she goes to the authorities, she risks deportation at the instance of her abusive spouse, and either having her children deported too or being separated from them and unable to protect them. We in Congress who write the immigration laws have a responsibility to do what we can to make sure they are not misused in this fashion. That is why I am so pleased that the final version of this legislation includes this and other important provisions. ¹⁶

“The battered immigrant women provision is also important to many New Mexico residents. No longer will battered immigrant women and children be faced with deportation for reporting an abuser on whom they may be dependent on for an immigration benefit. No person residing in the United States should be immune from prosecution for committing a violent crime because of a loophole in an immigration law.” 223-224

“The bill also includes additional legislation that the conferees felt must be moved quickly. In particular, the legislation now includes the Violence Against Women Act of 2000. The original Violence Against Women Act expired last Thursday, leaving millions of American women without protection from the violence that they suffer in their lives. This Act reauthorizes through Fiscal Year 2005 the key programs included in the original Violence Against Women Act, such as the STOP, Pro- Arrest, Rural Domestic Violence and Child Abuse Enforcement, and campus grants; battered women’s shelters; the National Domestic Violence Hotline; rape prevention and education grant programs; and three victims of child abuse programs, including the court-appointed special advocate program (CASA). It also makes some improvements responding to the experience with the original act, including authorizing grants for legal assistance for victims of domestic violence, stalking, and sexual assault and strengthening and refining

¹⁵ *Id.* at S10,205.

¹⁶ *Id.* at S10,219-20.

the protections for battered immigrant women, including a new visa for battered immigrant women. It is fitting that this bill address the severe problems of both trafficking and of violence against women in the United States.”¹⁷

“We must work to support America’s young women, our future leaders, and this bill reaches out to them through efforts to prevent campus sex crimes and efforts to prevent teen suicide. In light of the recent attention to many immigration issues, I am pleased this bill addresses the needs of battered immigrant women and takes protective steps to address their plight.”¹⁸

“Mr. Speaker, I [CHRIS SMITH] am also very proud that Division B is the Violence Against Women Act of 2000, of which I was also a co-sponsor along with HENRY HYDE, BILL MCCOLLUM, CONNIE MORELLA and other colleagues from both parties. This Act includes provisions to reauthorize federal programs that combat violence against women, to strengthen law enforcement to reduce violence against women, to strengthen services to victims of violence, to limit the effects of violence on children, to strengthen education and training to combat violence against women, to enact new procedures for the protection of battered immigrant women, and to extend the Violent Crime Reduction Trust Fund. Mr. Speaker, we cannot wait one more day to begin saving the millions of women and children who are forced every day to submit to the most atrocious offenses against their persons and against their dignity as human beings. I urge unanimous support for the Victims of Trafficking and Violence Protection Act of 2000.”¹⁹

“Mr. Speaker, I rise today to urge all of my colleagues to vote for H.R. 3244, the Trafficking Victims Protection Act, which includes reauthorization of the Violence Against Women Act. The Strengthened Violence Against Women Act (VAWA) we will vote on today reauthorizes current VAWA grant programs for five years, makes targeted improvements, and adds important new programs. The bill strengthens law enforcement efforts to reduce violence against women, increases services to victims of violence, seeks to limit the effects of violence on children, enhances education and training to combat violence against women, and provides important new protections for battered immigrant women.”²⁰

DHS Regulations Have Also Recognized, Respected, and Effectively Implemented the U Visa Program Consistent With This Legislative History and Purpose

In 2007 and 2008, the George W. Bush Administration implemented both the U visa regulations and the T and U adjustment of status rules. In issuing both sets of regulations, DHS confirmed and clarified the purpose of the U visa program in a manner that furthered the goals of the program consistent with its legislative history and purpose.

¹⁷ 146 Cong. Rec. H9040 (2000).

¹⁸ *Id.* at H9041.

¹⁹ *Id.* at H9045.

²⁰ *Id.* at H9046.

U Visa Regulations

“The purpose of the U nonimmigrant classification is to strengthen the ability of law enforcement agencies to investigate and prosecute such crimes as domestic violence, sexual assault, and trafficking in persons, while offering protection to alien crime victims in keeping with the humanitarian interests of the United States.”²¹

“Alien victims may not have legal status and, therefore, may be reluctant to help in the investigation or prosecution of criminal activity for fear of removal from the United States. In passing this legislation, Congress intended to strengthen the ability of law enforcement agencies to investigate and prosecute cases of domestic violence, sexual assault, trafficking of aliens and other crimes while offering protection to victims of such crimes. See BIWPA, sec. 1513(a)(2)(A). Congress also sought to encourage law enforcement officials to better serve immigrant crime victims. *Id.*”²²

“The findings that Congress expressed in sections 1513(a)(1) and (2) of the BIWPA make clear that the intent behind the creation of U nonimmigrant status was to facilitate the investigation and prosecution of criminal activity of which immigrants are targets while providing protection for victims of such criminal activity.”²³

“USCIS is cognizant of the fact that law enforcement agencies and prosecutors need a stable mechanism through which to regularize the status of victims and witnesses, but is equally cognizant of the fact that Congress saw fit to limit the number of aliens who may be granted U nonimmigrant status in any given fiscal year. USCIS has determined that to balance the statutorily imposed numerical cap against the dual goals of enhancing law enforcement’s ability to investigate and prosecute criminal activity and providing protection to alien victims of crime, it will create a waiting list should the cap be reached in a given fiscal year before all petitions are adjudicated. USCIS’s goal is to respect the intent of the numerical limitation imposed by Congress while still allowing the legislation to achieve maximum efficacy. USCIS believes that this rule’s waiting list methodology will provide a stable mechanism through which victims cooperating with law enforcement agencies can regularize their immigration status²⁴... the decision to waive the petition fee reflects the humanitarian purposes of the authorizing statutes. This blanket fee exemption is because it is consistent with the legislative intent to assist persons in these circumstances.”²⁵

In describing the type of crimes covered by the U visa the preamble to the U visa regulations states:

²¹ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. Vol. 53014 (Sept. 17, 2007) (to be codified at 8 C.F.R. pts. 103, 212, 214, 248, 274a, and 299).

²² New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,014-15.

²³ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,018.

²⁴ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,027.

²⁵ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,031-32.

“The list of qualifying crimes represents the myriad types of behavior that can constitute domestic violence, sexual abuse, or trafficking, or are crimes of which vulnerable immigrants are often targeted as victims.”²⁶

The U visa regulations also focused on Congressional goals to protect vulnerable victims in defining the harm which victims of witness tampering, obstruction of justice and perjury would need to prove to gain U visa status:

“USCIS looked to the purpose of the BIWPA—to encourage cooperation with criminal investigations and protect vulnerable victims (BIWPA sec. 1502)— and to the federal definitions of the term “victim.” As discussed above, in order to be classified as a victim under Federal law, an individual must suffer direct and proximate harm. Therefore, USCIS considered which categories of people would suffer direct and proximate harm from witness tampering, obstruction of justice, and perjury. USCIS identified one such category as individuals who are harmed when a perpetrator commits one of the three crimes in order to avoid or frustrate the efforts of law enforcement authorities. USCIS identified another such category as individuals who are harmed when the perpetrator uses the legal system to exploit or impose control over them. Accordingly, this rule provides that a victim of witness tampering, obstruction of justice, or perjury is an alien who has been directly and proximately harmed by the perpetrator of one of these three crimes, where there are reasonable grounds to conclude that the perpetrator principally committed the offense as a means: (1) To avoid or frustrate efforts to investigate, arrest, prosecute, or otherwise bring him or her to justice for other criminal activity; or (2) to further his or her abuse or exploitation of or undue control over the alien through manipulation of the legal system. New 8 CFR 214.14(a)(14)(ii).”²⁷

The preamble to the U visa regulations recognizing the impact removal would have on both victims and prosecutions stated that:

“Following passage of the BIWPA in October 2000, USCIS implemented procedures to ensure that those aliens who appeared to be eligible for U nonimmigrant status under the BIWPA would not be removed from the United States until they had an opportunity to apply for such status.”²⁸

In discussing the reasons for the creation of the U visa wait-list approval system the regulations preamble states as follows:

“Advantages to this alternative include: assisting law enforcement agencies by allowing the alien victim to remain in the United States to assist in the investigation or prosecution of criminal activity while waiting for new numbers to become available; improving customer service by allowing victims to remain in the United States, giving them an opportunity to access victims services to which they may be entitled; and providing

²⁶ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,015.

²⁷ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,017.

²⁸ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,015.

employment authorization to alien victims so they will have a lawful means through which to support themselves and their families.”²⁹

The regulations sought to avoid harming victims and criminal cases by offering:

“Little assurance that the alien victim will not be removed from the United States; law enforcement has no assurance that the alien victim will be present in the United States to assist in the investigation or prosecution of criminal activity; without permission to remain in the U.S., the alien victim may be deprived of victims services to which they may be entitled.”³⁰

In discussing the need to issue the U visa rule as an interim final rule that will take effect immediately under the good cause exception to the Administrative Procedures Act to avoid serious harm to both the victims and the detection, investigation and prosecution of crime, USCIS explained:

“USCIS finds a compelling public need for rapid implementation of this rule justifying the exception allowed by the Administrative Procedure Act (APA) to the requirements for soliciting public comment before a rule shall take effect. 5 U.S.C. 553(b)(3)(B). This exception should be used by agencies in cases, such as this, where delay could result in serious harm. See, *Jifry v. Fed. Aviation Admin.*, 370 F.3d 1174 (D.C. Cir. 2004) (finding the exception excuses notice and comment where delay could result in serious harm). Congress created the new U classification to curtail criminal activity, protect victims of crimes committed against them in the United States, and encourage victims to fully participate in the investigation of the crimes and the prosecution of the perpetrators. See BIWPA sec. 1513(a)(2). Many immigrant crime victims fear coming forward to assist law enforcement until this rule is effective. Thus, continued delay of this rule further exposes victims of these crimes to danger, and leaves their legal status in an indeterminate state. Moreover, the delay prevents law enforcement agencies from receiving the benefits of the BIWPA and continues to expose the U.S. to security risks and other effects of human trafficking. Therefore, delay in the implementation of these regulations would be contrary to the public interest.... Plus, these regulations have required input and coordination with law enforcement agencies affected by this rule to balance its humanitarian goals and law enforcement interests.”³¹

The “Not Unreasonably Refuse” Requirement Creating a Statutory Exception For Victims Who Could Not Cooperate With Future Requests for Assistance

Why the Exception Was Created

²⁹ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,033.

³⁰ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,034.

³¹ New Classification for Victims of Criminal Activity, 72 Fed. Reg. at 53,032.

Based on social science research,³² Congress understood that in many criminal cases, crime victims, particularly victims of domestic violence and sexual assault, often for very good reasons find that they cannot cooperate with requests from law enforcement and prosecutors for further cooperation after a victim is initially helpful in reporting a crime and working with police investigators and prosecutors. This well documented pattern of difficulty victims have in providing ongoing cooperation is due to many factors and often is primarily based on fears of retaliation or because the victim is experiencing the perpetrator’s retaliation and witness tampering efforts.³³ It can also be due in part to the trauma the victim suffered caused by the crime victimization.

These retaliation and witness tampering efforts with immigrant victims often include immigration related abuse — threats of deportation and abusers contacting immigration enforcement officials to provide “tips” designed to trigger immigration enforcement actions, detention, and deportation of the crime victim.³⁴ Research has found that once a victim has filed for immigration relief under the VAWA, T visa, or U visa programs, perpetrators of domestic violence, sexual assault, child abuse, and human trafficking are actively involved in trying to provide information to ICE that will trigger the victim’s removal, detention, or being placed in removal proceedings.³⁵ Research has found that when immigrant victims with pending VAWA self-petitions and U visa cases become the subject of immigration enforcement, 38% of those enforcement actions against VAWA self-petitioners and 25-27% of the enforcement actions

³² Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty* (2012); Edward W. Gondolf, *The Effect of Batterer Counseling on Shelter Outcome*, 3 *Journal of Interpersonal Violence*, No. 3 at 276 (Sept. 1988); Cynthia Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* at 129 (1989).

³³ Kerry Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, National Institute of Justice: Research in Action (Oct. 1995) (Only unsuccessful intimidation ever came to the attention of police or prosecutors), <https://www.ncjrs.gov/pdffiles/witintim.pdf>.

³⁴ VAWA confidentiality laws were designed to ensure that immigration and customs enforcement officials did not rely on perpetrator provided information to initiate or follow through on immigration enforcement actions against immigrant victims. VAWA confidentiality laws also ensure that the perpetrator could not successfully provide information that USCIS officials could use as adverse evidence in adjudicating the victim’s case for victim based immigration relief. In implementing VAWA confidentiality rules the Department of Homeland Security explained:

“There are a number of ways DHS employees might receive “tips” from an abuser or an abuser’s family, such as: calling ICE to report the victim as illegal, a “landlord” (who may actually be a human trafficker) calling ICE to report that his “tenants” are undocumented, or providing information to USCIS rebutting the basis for the victim’s application. When a DHS employee receives adverse information about a victim of domestic violence, sexual assault, human trafficking or an enumerated crime from a prohibited source, DHS employees treat the information as inherently suspect.”

Dept. of Homeland Security, Instruction Number: 002-02-001, Implementation of Section 1367 Information Provisions, 10 (Nov. 7, 2013), <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-001/>.

³⁵ Krisztina E. Szabo, David Stauffer, Benish Anver, *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*, National Immigrant Women’s Advocacy Project (Feb. 12, 2014),

http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/; Rafaela Rodrigues, Alina Husain, Amanda Couture-Carron, Leslye E. Orloff & Nawal H. Ammar, *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey*, National Immigrant Women’s Advocacy Project (May 3, 2018), <http://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report/>.

against U visa victims were triggered by calls from the victim’s perpetrators that ICE relied upon.³⁶ Even more harmful for domestic violence victims and criminal investigations against perpetrators is the fact that when immigrant and limited English proficient victims call the police for help, perpetrators who often speak English well were successful in getting the 15-17% of victims with pending VAWA self-petitions arrested along with or instead of the perpetrator. The percent of victims with pending U visa cases who call police for help and are arrested instead of or in addition to the perpetrator is also significant and has more than quadrupled from 2013 to 2017 (7.5% in 2013 to 36% in 2017).³⁷ Perpetrators’ active efforts to have the immigrant victim removed or detained is designed to end the victim’s ability and/or willingness to continue to cooperate with requests from law enforcement and prosecutors for assistance in detection, investigation, prosecution, conviction, and/or sentencing of the perpetrator.

To undermine the impact of these actions by perpetrators on the ability of U visa victims to come forward, report criminal activities and participate in justice system actions (civil and criminal) against the perpetrator, Congress wrote into the U visa statute the ability of U visa immigrant victims to reasonably refuse to provide ongoing cooperation.³⁸ Congress decided that U visa applicants and U visa recipients can refuse to continue to cooperate with law enforcement or prosecutors when under the totality of the circumstances,³⁹ the victim’s refusal was not unreasonable.⁴⁰ In doing this, Congress created an option for U visa victims who had been helpful in the past or who were currently being helpful, at the time they received certification and filed their U visa applications, to be able to have their U visas granted and to be able to receive lawful permanent residency as a U visa recipient even when the victim decided they could not comply with all requests from the law enforcement or prosecution agency that certified their U visa. Providing this option was a core component of the victim-centered approach the U visa drafters took to help ensure that the U visa could serve as an effective tool so that “[t]his visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.”⁴¹

The statutory scheme Congress created and the U visa regulations implemented to accomplish the goal of encouraging law enforcement to better serve immigrant victims was to provide immigration relief and protection from deportation to immigrant survivors who mustered the courage to come forward and be helpful to law enforcement. Congress made each of the following groups of immigrant victims eligible who offered helpfulness to government entities at

³⁶ *Id.*

³⁷ *Id.*

³⁸ 8 U.S.C. § 1255(m)(1).

³⁹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 8 C.F.R. § 245.24(a)(5) (2008).

⁴⁰ 8 U.S.C. § 1255(m)(1); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 8 C.F.R. § 245.24(a)(5) (2008).

⁴¹ Violence Against Women Act of 2000, Pub. L. No. 106-386, § 1512(a)(2), 114 Stat.1464 (2000); Violence Against Women Act of 1994, Pub. L. 103-322, §§ 40,001-40,703 (1994).

any time in the past, who were currently being helpful and also to those immigrant victims that government entities believed were likely to be helpful in the future. The process of applying for and obtaining lawful permanent residency through the U visa would take several years and victims could not apply for lawful permanent residency until they were in U visa statute for three years.

Congressional drafters of the U visa needed to grapple with the reality that it was clear from research that victims of domestic violence often are unable to consistently, over a period of time, provide helpfulness to law enforcement and prosecutors in criminal investigations and prosecutions of their husbands and intimate partners who are domestic violence perpetrators.⁴² Since there were very good reasons why battered women who initially provide important helpful information that helps government agencies detect, investigate, or prosecute domestic violence find that they cannot safely provide ongoing cooperation related to the perpetrators threats, intimidation, retaliation, lethality, and the nature of power and coercive control in domestic violence relationships.⁴³ Coercive control used by perpetrators targets the independence, autonomy, dignity, and social support that is necessary for them to leave their abuser.⁴⁴ Many women who attempt to leave their abuser in the early stages of abuse often return due to economic dependence or psychological commitment.⁴⁵ One study found that within two months of leaving a shelter for domestic violence victims, 55% were living with their batterer again.⁴⁶ It is also known that the longer violence persists, the more escalated and dangerous the abuse becomes, which makes it important for prosecution of the perpetrator to continue.⁴⁷ For this reason, best practices in criminal investigations and prosecutions of domestic violence were designed to develop and present evidence in the criminal case that could be used to prosecute domestic violence perpetrators when the victims as a result of their perpetrators threats and coercion could not continue to safely testify or otherwise participate in the domestic violence prosecution.⁴⁸

Highlights from Research on Domestic and Sexual Violence Experienced By Immigrant Victims

Perpetrators of sexual violence — including employers, supervisors, co-workers, co-habitants, and housing providers — frequently use these fears and threats to exert power and

⁴² Evan Stark, *Re-presenting Battered Women: Coercive Control and the Defense of Liberty* (2012).

⁴³ *Id.*

⁴⁴ *Id.* at 4.

⁴⁵ Edward W. Gondolf, *The Effect of Batterer Counseling on Shelter Outcome*, 3 *Journal of Interpersonal Violence*, No. 3, p. 276 (Sept. 1988).

⁴⁶ *Id.*

⁴⁷ Cynthia Gillespie, *Justifiable Homicide: Battered Women, Self-Defense, and the Law* 129 (1989).

⁴⁸ Louise Ellison, *Prosecuting Domestic Violence Without Victim Participation*, 65 *The Modern Law Review* No. 6, pp. 834-858 (Nov. 2002).

control over their victims.⁴⁹ Immigrants' sexual assault victimization that occurs within families, perpetrated by a parent, step-parent, spouse, intimate partner, child, or other family member is covered by state domestic violence, child abuse, and sexual assault laws. Nearly 1 in 5 women (19%)⁵⁰ and 1 in 59 men (nearly 2%) in the U.S. have been raped at some time in their lives.⁵¹ Statistically, 70% to 80% of sexual assault victims know their assailant, while only 22% of victims are assaulted by strangers.⁵² Of the assaults where the victim knows the perpetrator, 30% are committed by family members or intimate partners (11% by fathers or step-fathers, 10% by boyfriends or ex-boyfriends, and 9% by husbands or ex-husbands).⁵³ Farmworker children fall victim to sexual abuse in shared homes by adults who live in their home.⁵⁴ At work, farmworkers have been forced to endure ongoing rape in exchange for employment, housing or transportation. Sexual assault is also perpetrated against farmworker women by co-workers or supervisors when victims are working in remote areas.⁵⁵ Recently-arrived immigrant women and girls are also highly susceptible to gender based crime victimization in the United States including child abuse, child sexual exploitation, incest, dating violence, domestic violence, sexual assault, and human trafficking.⁵⁶

Immigrant survivors of sexual assault are frequently unaware of, have incorrect information about, or encounter difficulties when they try to access services that, as a matter of law, are available to help them.⁵⁷ Immigrant victims of sexual violence often confront two burdens: (1) the trauma of the sexual violence they experienced; and (2) legal, economic, community, and other significant pressures that are related to, or arise from, their status as immigrant victims.⁵⁸ Immigrant girls and women, particularly those with undocumented or temporary immigration status, are often afraid to report crime victimization to law enforcement officials out of fear that such reports will lead to deportation. Social vulnerability may arise out of fears about the impact

⁴⁹ *Injustice on Our Plates: Immigrant Women in the U.S. Food Industry*, Southern Poverty Law Center, 42 (2010), http://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/Injustice_on_Our_Plates.pdf.

⁵⁰ Center for Disease Control, National Intimate Partner and Sexual Violence Survey, at 2, available at, https://www.cdc.gov/violenceprevention/datasources/nisvs/index.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fviolenceprevention%2Fnisvs%2Findex.html.

⁵¹ *Id.* at 3.

⁵² D.G. Kilpatrick, C.N. Edmunds, & A.K. Seymour, *Rape in America: A Report to the Nation*. National Victims Center, Arlington (1992).

⁵³ Callie M. Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992-2000*, U.S. Dept. of Justice, Office of Justice Programs (2002), <https://www.bjs.gov/content/pub/pdf/rsarp00.pdf>.

⁵⁴ *Sexual Violence Against Farmworkers: A Guidebook for Legal Providers*, California Rural Legal Assistance, Inc.; Esperanza of the SPLC; Lideres Campesinas; and Victim Rights Law Center, at 9, https://www.victimrights.org/sites/default/files/Farmworkers%20Legal%20Providers_0.pdf.

⁵⁵ *Id.*

⁵⁶ *Review of the President's Emergency Supplemental Request for Unaccompanied Children and Related Matters*: Hearing on S. 272 DHS Appropriations Bill Before the S. Comm. on Appropriations, 113th Cong. (2014) (statements of Jeh Johnson, Sec. of Dept. of Homeland Security, and Sen. Dick Durbin), available at <http://www.c-span.org/video/?320318-1/hearing-emergency-border-security-funding>.

⁵⁷ Meaghan Fitzpatrick, Benish Anver, David Stauffer, Krisztina Szabo & Leslye Orloff, *Access to Emergency Shelters and Transitional Housing for Battered Immigrants and Immigrant Victims of Crime*, National Immigrant Women's Advocacy Project, at 8 (2014), <http://niwaplibrary.wcl.american.edu/pubs/access-shelters-housing/>.

⁵⁸ Jessica Mindlin, Leslye E. Orloff, Sameera Pochiraju, Amanda Baran & Ericka Echavarría, n.d., *Dynamics of Sexual Assault and the Implications for Immigrant Women*, National Immigrant Women's Advocacy Project, at 1 (2018), <http://niwaplibrary.wcl.american.edu/pubs/ch1-dynamics-sexual-assault-implications/>.

disclosure about sexual assault may have on their relationships in their cultural community or with their family members.⁵⁹

Immigrant victims from a wide range of backgrounds and cultures are at increased risk for domestic violence victimization compared to U.S.-born women with abuse rates ranging from 30% to 50%.⁶⁰ Abuse rates are highest when the battered immigrant's abuser is their U.S. citizen spouse.⁶¹ There is a growing body of research which has found that immigrant victims are particularly vulnerable to domestic violence and tend to have fewer resources, stay longer in abusive relationships, and sustain more severe consequences with regard to both physical and emotional damage from abuse and a longer duration of abuse compared to other battered women in the United States.⁶² Additionally, for immigrant women who come to the U.S. with their partners many (48%) report that their partner's violence increased since they immigrated to the United States.⁶³ Among immigrant battered women, immigration related abuse including threats of deportation are a potent weapon used to silence victims with a National Institutes of Justice funded study finding that 65% of battered immigrants reported that their abusers use threats of deportation to keep them in abusive homes, to prevent them from seeking help, and to undermine their ability to turn to the justice system for help.⁶⁴ Research in New York found that Immigrant women are also victims of intimate partner homicide at higher rates (51%) compared to U.S. born women (45%).⁶⁵ To address this issue the Violence Against Women Act created VAWA self-petitions and improved battered spouse waivers in 1994 and created the U visa in 2000 to provide immigration relief to battered immigrant victims and their children.

Congressional and DHS Regulations Written Understanding Research Findings on Dynamics of Domestic and Sexual Violence

Based on understanding these dynamics, Congress created the U visa process in a manner that required victims to provide helpfulness in the crime detection, prosecution, conviction, or sentencing. Congress also wrote into the same statute an option for victims to demonstrate that their inability to cooperate after the initial helpfulness they provided was not unreasonable.

⁵⁹ Michele Decker, Anita Raj & Jay Silverman, "Sexual Violence against Adolescent Girls: Influences of Immigration and Acculturation," *Violence Against Women* 13, at 498-507 (2007).

⁶⁰ Anita Raj & Jay Silverman, *Violence Against Immigrant Women: The Roles of Culture, Context, and Legal Immigrant Status on Intimate Partner Violence*, Boston University/Harvard University, pp. 367-368, <http://niwaplibrary.wcl.american.edu/pubs/culture-context-status-roles/>.

⁶¹ Giselle Aguilar Hass, Nawal Ammar & Leslye Orloff, *Battered Immigrants and U.S. Citizen Spouses*, National Immigrant Women's Advocacy Project, 1 (2006), <http://niwaplibrary.wcl.american.edu/pubs/battered-immigrants-u-s-citizen-spouses/>.
⁶² *Id.* at 2.

⁶³ Dutton, Mary; Leslye Orloff & Giselle Aguilar Hass, *Characteristics of Help-Seeking Behaviors, Resources, and Services Needs of Battered Immigrant Latinas: Legal and Policy Implications*, *Georgetown Journal on Poverty Law and Policy* 7(2). (2000).

⁶⁴ Edna Erez Ph.D. & Nawal Ammar Ph.D., *Violence Against Immigrant Women and Systemic Responses: An Exploratory Study* (2003), <http://niwaplibrary.wcl.american.edu/pubs/cult-tkit-erezammarstudy-11-14-03/>; https://www.futureswithoutviolence.org/userfiles/file/ImmigrantWomen/IPV_Report_March_2009.pdf.

⁶⁵ *Femicide in New York City: 1995-2002*, New York City Department of Health and Mental Hygiene (Oct. 2004), <http://www.ci.nyc.ny.us/html/doh/html/public/press04/pr145-1022.html>.

Victims would be required to show that they did not unreasonably refuse to cooperate with reasonable requests for cooperation at the end of the U visa process when they were applying for lawful permanent residency.

This approach provided victims the flexibility to report criminal activity and participate in criminal investigations and prosecutions to the extent they could safely do so and to the extent they could handle the trauma involved in the process. It also allowed many criminal investigations and prosecutions to be ultimately successful because it did not sanction a victim and cut them off from U visa relief or threaten them with removal for failure to comply with every request for cooperation.

This approach recognized the fact that many battered women try to leave their abusers an average of seven times before they are able to safely separate. It is recognized that the most dangerous time for victims is when they attempt to leave their abusers, when they report the abuse, seek assistance from the justice system, or in the case of immigrant victims, when they seek immigration relief. When the abuser feels a loss of power and control over the victim the violence escalates. When battered women take steps to leave the abusive relationship and/or steps to curb the abuse, the level of violence victims are subjected to increases. The standard used by Congress allows victims to go back and forth in their efforts to safely leave the perpetrator without any lack of cooperation or assistance that occurs being deemed unreasonable. This approach also protects victims whose ongoing helpfulness would endanger the victim or her children or other family members.

Regulations: U Visa and T and U Adjustment

In issuing the T and U Visa Adjustment rule in 2008, the Bush Administration provided a detailed explanation of the purpose and goals of the T and U visa statutory approach. This approach built upon the U visa statute's legislative history's stated purpose of encouraging law enforcement, prosecutors, and other certifying agencies including courts to improve their work with victims in immigrant communities. DHS published the following language recognizing the need to offer protection to vulnerable immigrant victims consistent with the humanitarian interests of the United States. This approach improves outcomes in criminal investigations, the willingness of immigrant victims to seek help from the family, civil and criminal courts, and promotes family unity and stability of immigrant victims making their participation in the justice system more effective. In conjunction with the T and U visa adjustment of status rule DHS wrote:

“Authorizing adjustment of status for such victims uses USCIS benefits as part of a collaborative federal effort incorporating immigration status issues, which are often at

the forefront of a victim’s concern. The VTVPA, as amended, takes a victim-centered approach to addressing trafficking. Trafficking victims are often reluctant to testify due to fear of reprisals against themselves or their family members, or fear of removal from the United States to countries where they can face additional hardships, retribution, or alienation. Additionally, trafficking victims not familiar with their rights may be afraid to report their abusers for fear of their own detention, prosecution, or deportation. This effort is coupled with additional state and federal criminal laws, government benefits, services, and protections for victims. By passing the VTVPA, and subsequent amendments thereto, Congress recognized that victims of severe trafficking should be protected if they assist in prosecution of the traffickers, rather than be punished and deported for unlawful entry, or unauthorized employment. The protections provided by this law address the lack of legal rights, protection, and access to the legal system because of the illegal presence of trafficking victims. Violent crime. Congress created the U nonimmigrant status (“U visa”) to provide immigration protection to crime victims who assist in the investigation and prosecution of those crimes. Although there are no specific data on alien crime victims, statistics maintained by DOJ have shown that aliens, especially those aliens without legal status, are often reluctant to help in the investigation or prosecution of crimes. U visas are intended to help overcome this reluctance and aid law enforcement accordingly.”⁶⁶

“The provisions of this rule are essential to the effective administration of the T and U nonimmigrant adjustment of status provisions. This rule will further humanitarian interests by protecting victims of human trafficking and victims of other serious crimes who have provided assistance to U.S. law enforcement in the investigation or prosecution of such crimes. Also, this rule will strengthen the ability of the law enforcement agencies to investigate and prosecute crimes by providing immigration benefits to victims.”⁶⁷

“This regulation will positively affect family well-being by encouraging vulnerable individuals who have been victims of a severe form of trafficking in persons or other specified criminal activity to report the trafficking and criminal activity and to aid law enforcement in the investigation and prosecution of cases and by providing critical assistance and benefits to victims. Additionally, this regulation provides the means for both victims and qualified family members to adjust their status to lawful permanent residence, thereby ensuring family unity and stability.”⁶⁸

A crucial component of the U visa law that was designed to make it possible for more victims to come forward and offer helpfulness in the detection, investigation, prosecution, sentencing, and/or conviction of perpetrators of criminal activities against vulnerable immigrant victims. This allowed victims to attain U visas and lawful permanent residency as U visa holders so long as they did not unreasonably refuse to offer assistance to U visa certifying officials. At

⁶⁶ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. 75,554 (Dec. 12, 2008) (to be codified at 8 CFR pts. 103, 212, 214, 245 and 299).

⁶⁷ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. at 75,555.

⁶⁸ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. at 75,556.

the time we wrote the statute, we understood that few victims of domestic violence, sexual assault, child abuse, elder abuser and human trafficking are able to consistently provide ongoing cooperation with criminal investigations and prosecutions even when the victim is a U.S. citizen and immigrant victims face additional barriers to their ability to provide helpfulness every time requested. Having experience with both immigrant and citizen crime victims we sought a statutory approach that would realistically work for both victims and law enforcement. Congress knew that by providing this important flexibility in the statute, in the long run more immigrant victims would come forward and be able to offer helpfulness to government officials in the detection, investigation and prosecution of greater numbers of criminal activities. In fact, research has shown that once immigrant victims file for immigration relief the rates at which they are willing to turn to the justice system for help in the future goes up.⁶⁹ To accomplish this, the statute was written to grant immigrant crime victims the ability to attain U visas and lawful permanent residency even when they do not offer ongoing assistance so long as their refusal(s) to provide assistance was not unreasonable.

In publishing the U visa regulations, DHS stated:

“[I]n order to qualify for permanent resident status on the basis of the U nonimmigrant classification, the alien must not have unreasonably refused to provide assistance in a criminal investigation or prosecution. INA sec. 245(m)(1), 8 U.S.C. 1255(m)(1). This requirement further suggests an ongoing responsibility to cooperate with the certifying official while in U nonimmigrant status.”⁷⁰

The published explanation of the T and U Visa Adjustment rule by DHS states:

“Section 245(m)(1) of the Act, 8 U.S.C. 1255(m)(1), prohibits USCIS from adjusting the status of an otherwise eligible U nonimmigrant if the Attorney General determines, based on affirmative evidence, that the U nonimmigrant unreasonably refused to provide assistance to a Federal, State, or local criminal investigation or prosecution. USCIS interprets this statutory provision as imposing an ongoing requirement for U–Inonimmigrants not to refuse unreasonably to provide assistance in an investigation or prosecution. For a derivative family member of a U–1 nonimmigrant (a U–2, U–3, U–4, or U–5 nonimmigrant) who was not required to provide such assistance as a prerequisite for obtaining U nonimmigrant status, USCIS interprets this provision to mean that if the derivative U–2, U–3, U–4, or U–5 nonimmigrant possessed information about the

⁶⁹ Kristina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims’ Immigration Cases Are Pending*, National Immigrant Women’s Advocacy Project at 2-3 (2014), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf>; Kristina E. Szabo, David Stauffer, Benish Anver & Leslye E. Orloff, *Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants*, National Immigrant Women’s Advocacy Project at 29-30 (2014), http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/FINAL_Report-on-Early-Access-to-EAD_02.12.pdf.

⁷⁰ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,019 (Sept. 17, 2007) (to be codified at pts. 103, 212, 214, 248, 274a and 299).

qualifying criminal activity on which the U–1 nonimmigrant petition was based and was asked to assist in the investigation or prosecution, the derivative U nonimmigrant has a responsibility not to unreasonably refuse to provide that assistance.⁷¹

“The rule provides that the determination of whether an alien’s refusal to provide assistance was unreasonable will be based on all available affirmative evidence and take into account the totality of the circumstances and such factors as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe trauma (either mental or physical), and the age and maturity of the applicant. New 8 CFR 245.24(a)(5). In order to facilitate implementation of this statutory requirement, the rule provides that applicants must submit evidence that demonstrates whether or not they received requests for assistance from an official or law enforcement agency that had responsibility for the investigation or prosecution of persons in connection with the qualifying criminal activity after the applicants were granted U nonimmigrant status and the applicants’ response to such requests. New 8 CFR 245.24(d)(8); 245.24(e). 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 Attorney General to determine whether any refusal was unreasonable. However, it is appropriate and consistent with the statutory scheme to require the applicants to describe any requests they received for law enforcement assistance, to identify the persons or agencies who made the requests, and to state how they responded to such requests. As a general matter, the alien is in a proper position to identify such basic facts relating to whether any such requests for assistance were made to the alien and how the alien responded to the requests. This information is necessary for the Attorney General to be able to evaluate whether an alien’s refusal to provide assistance was unreasonable under the circumstances.”⁷²

Social Science Support for This Approach

Social science research has found that the U visa statute’s approach has worked providing flexibility resulting in a significant proportion of U visa victims being able to find the security and support they needed to continue providing help to prosecutors and law enforcement in the investigation and prosecution of the perpetrators who harmed them. In research among immigrant U visa victims⁷³ whose cases had been approved and immigrant victims with pending U visa applications, 70% of U visa holders and U visa applicants over the course of the criminal investigation and prosecution of their perpetrators provided continued cooperation to law

⁷¹ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. at 75,546-47.

⁷² Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. at 75,547.

⁷³ This research included a pool of victims studies made up both victims whose U visa cases had been approved (65%) and victims whose applications were pending approval (35%).

enforcement and prosecution officials.⁷⁴ Further, in another 29.45% of the cases, the victim wanted to and was willing to provide additional cooperation but officials did not seek further cooperation from the victim. There are many forms of open criminal investigations in which the victim's ongoing cooperation is not requested. These are cases in which victims offer to cooperate, but their assistance is not requested by police and/or prosecutors.⁷⁵ Examples include:

- there is a warrant out for the arrest of the perpetrator who is eluding prosecution;
- the victim completed the examination for a rape kit which has not been tested or if the rape kit has been tested the perpetrator has not been identified;
- police have not been able to identify the perpetrator.⁷⁶

The second group of victims where ongoing cooperation is not being requested includes cases in which the perpetrator entered into a plea agreement or the victim filed for the U-visa after the criminal prosecution was completed.⁷⁷

The VAWA and U Visa Programs Promote Ongoing Immigrant Victim Justice System Participation

Of even greater importance in documenting the effectiveness of both the VAWA self-petitioning and U visa programs are research findings that both U visa and VAWA self-petitioner immigrant victims have high rates of ongoing future willingness for justice system participation. Research has found that after immigrant victims file their VAWA or U visa immigration cases, victims are willing to call the police for help and seek help from the courts.⁷⁸ This is despite the fact that large numbers of VAWA and U visa victims continue residing with their perpetrators or remaining in jobs with abusive employers until they reach the stage of their immigration case at which they receive work authorization.⁷⁹ Immigrant victims who have filed for immigration relief:⁸⁰

- Are more willing to file future police reports (U Visa 50.3%) (VAWA self-petitioners 36.2%);
- Help police and prosecutors in a criminal case (U Visa 73.1%) (VAWA self-petitioners 33.4%)
- Seek orders of protection (U Visa 43.7%) (VAWA self-petitioners 47.6%)

⁷⁴ Leslye Orloff, Levi Wolberg & Benish Anver, *U-Visa Victims and Lawful Permanent Residency*, National Immigrant Women's Advocacy Project at 1-5 (2012), <http://niwaplibrary.wcl.american.edu/pubs/pb-tkit-uvisalawfulpermanentresidency-9-6-12/>.

⁷⁵ *Id.* at 5.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Krisztina E. Szabo, David Stauffer, Benish Anver & Leslye E. Orloff. *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants*. National Immigrant Women's Advocacy Project at 29-30 (2014), http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/; Krisztina E. Szabo & Leslye E. Orloff, *The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending*, National Immigrant Women's Advocacy Project at 3-4 (2014), <http://niwaplibrary.wcl.american.edu/pubs/imm-qref-safetyplanning/>.

⁷⁹ *Id.* at 2.

⁸⁰ *Id.* at 2-3.

- Obtain help from family courts: Divorce (U Visa 19.5%) (VAWA self-petitioners 32.1%); Custody (U Visa 17.9%) (VAWA self-petitioners 20.1%); Child Support (U Visa 10.7%) (VAWA self-petitioners 26.1%).

Case Stories Illustrate The Effectiveness of the U Visa Program

The following story illustrates how the U visa program and the flexibility and protections it provides victims that recognize that the program has to operate in a manner that helps victims who for significant periods of time will continue to experience threats of deportation and ongoing violence and retaliation from their abusers. This story illustrates what police departments across the country using the U visa as a crime fighting tool are seeing and how the U visa makes a real difference in holding offenders accountable:

“The victim, who was pregnant at the time of the initial report, and her children endured years of abuse at the hands of the offender. He took possession of the victim and her children’s documents and repeatedly threatened to have her deported if any of them reported the abuse to the police. The victim suffered from severe domestic violence including strangulation and sexual assault, and the minor children were physically abused. On the night of the initial report to the police department, the victim was very reluctant to speak with officers due to her fear of being deported and separated from her children. The responding officers recognized her fear and made it clear to the victim that her status was of no concern to them. This enabled them to investigate the crimes against her and her children that had occurred that evening. A subsequent follow-up interview by the department’s victim services officer with the assistance of a qualified interpreter revealed numerous other felonies committed by the offender. A U visa certification was signed by the department’s certifying official while the case was progressing through the courts. The victim continued to assist in the investigation and prosecution of the case, reporting a protection order violation that occurred well after the initial response and subsequent investigation. The crimes reported the evening of the victim’s first call to police resulted in the offender being convicted of domestic assault and battery on a pregnant person and domestic assault and battery on a minor child. In addition, the victim’s ongoing cooperation with the victim services officer led to convictions for strangulation, violation of an abuse prevention order, and three counts of intimidation of a witness. The offender was sentenced to 24 months in prison, and the court order imposed numerous conditions that become effective upon his release”⁸¹

Law enforcement officials describe how the U visa has been crucial to the ability of law enforcement and prosecutors to detect recidivist crime perpetrators and conduct successful investigations, prosecutions, and convictions of sexual assault and rape perpetrators, human

⁸¹ *Id.* at 38.

traffickers and other crime perpetrators that would not have been possible without the U visa program. Examples law enforcement officials have provided include:

“One example is the therapist story. The perpetrator posed as a doctor, and the client of the therapist in this case, who was undocumented, was referred to the suspect for plastic surgery. The perpetrator scammed her, and in the process not only botched her surgery but also sexually assaulted her. She was not the only victim. Several other people turned out to be victims, over 10-15 victims. I have talked to only two victims who have come forward, but the word is out. The office will sign off on U-visas.”⁸²

“For most people who commit rapes, robberies and aggravated assaults, that is not an isolated incident, it’s their lifestyle. If the victim happens to be illegal and can help us get this person off the street, other people that would have been victimized now won’t be as a result of the immigrant coming forward.”⁸³

“What kind of person does the U-visa help? Consider ‘Stephanie,’ an immigrant living in Maryland who lacked work authorization. She had already been sexually harassed by work supervisors when a stranger followed her into a room in the building where she was working and tried to rape her. Stephanie was able to fight him off and immediately reported the incident to police, who found the man nearby and arrested him. After reporting the terrible crime, Stephanie learned she would be eligible for a U-visa for her cooperation with police and the state’s attorney. Her assistance helped get a rapist off the streets. Today, Stephanie has her U-visa and is confident and self-supporting. . . . The law enforcement community now has 17 years of experience with the Violence Against Women Act and has used it successfully to combat human trafficking, sexual assault and domestic violence. We have relied on it to protect survivors of all stripes and hold their abusers accountable.”⁸⁴

“One example began with a larceny case at a restaurant. In the process of reviewing surveillance for that crime, a detective observed a worker being sexually assaulted, got in touch with the worker, who turned out to be undocumented, and told her about the relief available. This victim then was able to identify someone who was sexually assaulting not only her but also other undocumented immigrants. As a result of this relationship, . . . undocumented immigrants in the community who learned this relief was available have been reaching out to advocates and contacting law enforcement. When people got the U-visa, it increased cooperation.”⁸⁵

⁸² Statement by Sergeant Inspector Antonio Flores (San Francisco, California), *The Importance of the U-visa as a Crime-Fighting Tool for Law Enforcement Officials - Views from Around the Country*, National Immigrant Women’s Advocacy Project at 7 (2012), <http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Qref-UVisaCrimeFightingTool-12.03.12.pdf>.

⁸³ *Id.* at 5, Statement by Sergeant Jay Eisner (DeKalb, Georgia).

⁸⁴ Mark Shurtleff & Doug Gansler, *Opinion: Weakening Violence Against Women Act betrays immigrant victims*, POLITICO (2012), <http://www.politico.com/news/stories/0912/81048.html>.

⁸⁵ Statement by Officer Michael LaRiviere, Salem Police Department (Salem, Massachusetts), *supra* note 82, at 3.

“For example, one case started in San Francisco when we received various complaints about fruit vendors selling fruit on a street corner. An officer approached a vendor, who was a minor, 14 or 15 years old, who was selling fruit on the corner. When he found out he was a minor, the officer asked who took care of him and how he got to the fruit stand. The child gave the officer the number he calls to get picked up every day, and when the officer called the number, the adult responded that he was taking care of the child but was not his parent or guardian. It turned out that the boy had been smuggled from Tijuana, through Arizona, and trafficked to San Jose where he was taught to sell fruit and then was trafficked to Oregon. He wanted to return home, but couldn’t, since he was on his own and they would not help him go back home. The suspects would tell the child that if the cops approached him and took his fruit, he would owe money, and if he did not sell the amount of fruit he was given, he would owe money, and would have no lunch or bathroom breaks. Child Protective Services got involved, and moved forward on that case as the child started identifying the people who brought him over. He mentioned a San Jose house and mentioned other children in his situation. Another woman and her husband came forward who had been sexually assaulted by the same perpetrator. The boy, the woman and her husband corroborated the story. We were able to take that case, identify all the parties, and the boy and the other victims were able to cooperate. We went to the FBI with the case, and it turns out all four brothers in San Jose were moving people from Mexico to Arizona and then to San Jose and up to Oregon depending on the fruit season. They are all in custody now. We certified the sexual assault and the minor victim. They came in because of the U-visa and T-visa.”⁸⁶

The benefits of the U visa program extend well beyond the victim’s initial case and protections for the victim including having a direct impact on improving officer safety.

“During a U visa law enforcement training conducted on the outskirts of a major metropolitan area, an officer shared an experience he had with an undocumented victim of crime. The officer and his partner, who worked in his agency’s gang task force unit had infiltrated one of the most violent gangs in the area. At the same time, the agency’s domestic violence unit was working with an undocumented domestic violence victim who happened to be the girlfriend of one of the leaders of the gang the officers were investigating. The domestic violence unit had signed a U visa certification for the victim, and the victim had a pending U visa application. The trust built between the victim and the domestic violence investigators in this case led to a call from the victim informing police when she overheard that the gang had identified that law enforcement officers had infiltrated the gang and were planning to kill the two gang unit officers. The immigrant victim called the domestic violence investigators she had been working with and reported

⁸⁶ *Id.* at 4 (convictions resulted from these investigations).

what she had heard. The agency’s attention to immigrant crime victims and their knowledge of the U visa process”⁸⁷

The 2019 Guide U-Visa Law Enforcement Resource Guide – Comments and Concerns

NIWAP convened law enforcement, prosecutors and judicial experts on the U visa program and U visa certification and the benefits that the U visa program provides in fighting crime and improving access to justice in communities across the country to review the 2019 Guide U-Visa Law Enforcement Resource Guide published by U.S. Citizenship and Immigration Services in August of 2019 (2019 Resource Guide). At the request of the team of certifiers NIWAP works with also compared information contained in 2019 Resource Guide with the U visa statute and regulations and identified areas in which the 2019 Resource Guide either was inconsistent with or differed from the statute and regulations. NIWAP is attaching and incorporating by reference **Attachment A** which is an annotated version of the 2019 U Visa Law Enforcement Resource Guide that demonstrates where this guide is not consistent with, misconstrues, or provides information that is contrary to the U visa statute, its legislative and regulatory history and the U visa regulations.

What follows here is an outline that highlights what law enforcement officials, prosecutors and judges with expertise certifying U visas have to say about the effect that the 2019 Resource Guide will have on their ability to fight crime and hold offenders accountable in their communities. We request that DHS and USCIS officials set up a call and invite the U visa certifiers on the attached list to a meeting or listening session to hear more on how the 2019 Resource Guide will impact certifiers and their communities.

Overall Approach That the 2019 Resource Guide Takes Will Undermine Certifications and the U Visa Program

The 2019 Guide Resource Guide will make it easier for prosecutors, police, judges and other certifying officials to say “I won’t do this, I won’t certify.” If this happens it is not just that the victim won’t come forward and seek help. As a result perpetrators will be more able to use DHS as a tool of abuse. If the perpetrator calls DHS to turn victims in and DHS enforcement officials act on the perpetrator’s calls the perpetrator will succeed in stopping criminal investigations and prosecutions of the perpetrator’s criminal activities. With the approach taken by this 2019 Guide, certification threats from perpetrators to deport their victim have become stronger and more effective. It becomes a problem of public safety, victim safety, and officer safety. There will be less likelihood of success in criminal investigations and prosecutions of crimes being committed in the community. The likelihood of victims able to participate in the

⁸⁷ Stacy Ivie, Michael LaRiviere, Antonio Flores, Leslye E. Orloff & Nawal H. Ammar, *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, The Police Chief, Volume LXXXV, Number 4 at 40 (April 2018).

prosecution will decrease exponentially from what it is today. The approach this 2019 Resource Guide takes will jeopardize the relations and trust that law enforcement officials, prosecutors and courts have worked hard to build with immigrant communities in their jurisdictions.

It will become harder to identify victim witnesses and pursue prosecutions of perpetrators. One judge who was a former prosecutor stated after reading the 2019 Resource Guide that “I would expect upwards of 75% of the women are not going to want to assist in the prosecution. The fact that they will not participate in the prosecution does not mean that they are unhelpful. Merely reporting has been helpful.” For prosecutors at the end of the day having a victim willing to participate in the prosecution is the primary goal. For perpetrators, their primary goal is to get the victim not to show up for the criminal prosecution. Lack of legal immigration status is another weapon perpetrators use to continue their pattern of abuse. We see this in domestic violence, child abuse and elder abuse cases, and in workplace sexual assault cases.

Prior to this 2019 Resource Guide, the U visa statute, regulations and prior DHS and USCIS publications were useful and helpful in encouraging victims to come forward to report crimes and participate in cases against their abusers and perpetrators. This 2019 Guide will hamper detection of crimes occurring in our communities. There will be a clear domino effect undermining local prosecutions and investigations. If the prospect of U visa certification diminishes fewer victims who initially reported crimes will have the path to stability and financial independence from the abuser they need to be able to offer the ongoing assistance needed for successful criminal investigations and prosecutions. As a result, the ability to fight crime will decrease dramatically and will create real public safety issues in communities across the country.

Fraud and Discretion Focus Without Equal or Greater Emphasis on The Purpose, Goals and Benefits of the U Visa Program

The law enforcement, prosecution and judicial certifiers who provided NIWAP with input on the 2019 Resource Guide unanimously expressed that the guide adopts a tone that generally discourages U visa certification. Although the Guide states at the beginning the certification is a tool for law enforcement agencies to use as part of a victim-centered approach, the U-visa guide is not designed to encourage agencies eligible to certify to sign U visa certifications. The Guide also suggests that certifying agencies assume burdensome roles including conducting background checks on victims that will slow down the certification process and that will be duplicative of the background checks that USCIS is already conducting as part of the U visa adjudication process.

Law enforcement officials commented that they did not believe running background checks on victims applying for U visas was necessary or appropriate as a regular part of the U visa certification process. There was concern that running victims through NCIC becomes very problematic. For example, with the Latino population when someone way down the list with a similar last name becomes a focus of investigation this can pose safety risks for the victim. Sometimes a person with the same name and the same date of birth is not the same person as the

individual in the NCIC database which is a common problem. They were concerned that running immigrant victims seeking U visas through NCIC would create a disparate standard in the way law enforcement officials treat immigrant victims compared to non-immigrant victims. Officials are working in small inter-related communities in which if immigrants learned that victims applying for U visas were run through background checks it would spread very fast through the community and undermine community policing efforts with immigrant communities. Prosecutors felt that with USCIS running background checks as part of the U visa adjudication and having the power under the statute and regulations to grant waivers of inadmissibility including past crimes the victim may have committed, there is no reason for state and local prosecutors and police to also run these checks. Victims could have criminal histories directly related to their victimization. For example, in one instance we had a problem where an agency would not certify a trafficking victim if they had a prostitution arrest. There was a general feeling that the background check recommendations in the 2019 Guide were designed to create an extra step and a disincentive to certification. It appears to focus the attention of certifying officials on investigating the victims rather than investigating the underlying crimes.

The Guide also fails in many ways to take into account the dynamics of domestic and sexual violence experienced by immigrant victims that Congress and DHS were cognizant of when drafting the U visa statute and writing the U visa regulations that are discussed in detail earlier in this letter. Instead, the 2019 Guide mentions a victim-centered approach, but is actually damaging because it does not take victim viewpoint affirmatively into account. Instead as a whole this guide turns this approach on its head completely. It attests that it will help out victims but the message is almost exactly the opposite of that. Instead of reminding law enforcement, prosecution and court officials about the dynamics of domestic and sexual violence they should understand if they have had training on these issues and how they can recognize the dynamics of domestic violence in the behaviors of victimization, the 2019 Guide spends a lot of time talking about people who may try to abuse access to U-Visa system. Law enforcement officials, prosecutors and judges are trained to be able to determine who is telling the truth about victimization and who is not. This is a core part of the work of these justice system officials and police and prosecutors are able to identify perpetrators in their communities who may try to take advantage of the U visa system. These officials are able to identify and deny certification to people who are committing violent crimes in their communities.

This 2019 Guide fails to take into account how lack of legal immigration status is used by perpetrators to silence victims and keep them from seeking justice system help. The 2015 Guide and the DHS roll call videos clearly recognized how lack of status was used by abusers. Without these immigration related abuse dynamics addressed the document is moot.

Although it is helpful for police, prosecution, and judicial certifiers to know about the system USCIS has created to prevent fraud in the U Visa program, the certifiers found that the strong emphasis in the Guide on fraud prevention coupled with how the Guide repeatedly stresses that agencies have the discretion not to certify creates the clear impression that the goal of this publication is to discourage government officials from signing U visa certifications. This is particularly true and underscored by the fact that this publication like no other produced by DHS

or USCIS in the past fails to fully recognize the important role U visa certification can play in building trust with immigrant crime victims needed for successful criminal investigations and prosecutions. Certifiers were concerned that particularly due to the brevity of the 2019 Guide, the repeated emphasis on there being no obligation to sign is troubling as is the fact that it appears to give agencies authorized to certify every reason not to sign U visa certifications.

Many certifiers and certification experts from various disciplines commented on how the 2019 Guide did not reflect an understanding of the dynamics of victimization, domestic and sexual violence, and other crimes victims suffer. The 2019 Guide misunderstands the situations that victims are placed in. When the 2019 Guide does not reflect an understanding of the victim dynamic and includes strong language on fraud and the tone it is very discouraging. It makes it hard for law enforcement and prosecutors to use the U visa effectively as a tool to help victims and keep communities safe. When fewer agencies as a result of this Guide will be willing to certify there is great concern with regard to what to tell immigrant victims to encourage them to participate in criminal cases and report crimes.

Judicial certifiers noted how this guide fails to fully address the role that the U visa statute assigns judges as U visa certifiers. The 2015 T and U Certification Resource Guide did a much better job of incorporating information about judicial certification. For example, on page 4 of the 2019 Guide USCIS acknowledges that certifiers will often not be the person at the certifying agency who has direct knowledge of the immigrant victim's case. The 2019 Guide, on page 4, recognizes that certifiers can certify either based on direct knowledge or relevant records. A judge could therefore certify because they were the judge who heard the case involving the immigrant victim. Judges also regularly certify based on a review of court records in a case heard by another judge. Similarly, supervisors in law enforcement and prosecution agencies certify based on records of a case that was investigated or prosecuted by another law enforcement or prosecution official. The 2019 Guide is inconsistent and confusing in its approach. On page 11 the 2019 Guide recommends that the "person who completes and signs the certification is/was not also the investigating officer," and on page 4 the guide says that the certifier should have direct knowledge. It appears that on page 4 when it says certifications can be based on a review of the records in the case that would allow for judges to sign certifications when the judge was not the judge who heard the case. This would also allow a supervisor to sign a certification for a case in which the supervisor does not have but would rely on the direct knowledge of the investigating officer. To be consistent all documents published by DHS should be clear that any U visa certifying agency can sign certifications based on the certifier's direct knowledge or the certifier's review of court or agency records that document the victim's helpfulness. Law enforcement officials also felt that the inclusion of the term "direct knowledge" was a new concept that is unclear and involves understanding nuances that need explanation and that nuance is challenging to explain.

The 2019 Resource Guide places an overwhelming emphasis on law enforcement certification, barely recognizing that the U visa statute and regulations and the 2015 Guide present the full range of government officials who can sign U visa certifications including but not limited to prosecutors, judges, adult and child protective services agencies, the EEOC and federal and state Departments of Labor. All of these entities detect, investigate, prosecute,

convict, or sentence criminal activities covered by the U visa program in their work. It is important to note that several of the government agencies authorized to certify in the U visa statute and regulations may be responsible for investigating, prosecuting or in the case of judges hearing cases in which the state, local, or federal agency or court has criminal, or civil, or administrative investigative or prosecutorial authority. In these cases, the certifying agency detects, investigates, prosecutes or in the case of courts detects, convicts, or sentences in cases in which the perpetrator has committed acts that constitute U visa listed criminal activities. For example, the EEOC regularly investigates and civilly prosecutes employers who have engaged in activities that include sexual assault or rape of an employee. State and federal departments of labor may find in their investigations of cases involving failure to pay wages to employees, evidence that the employer sexually assaulted, extorted funds from, feloniously assaulted employees. Although the EEOC and departments of labor may be pursuing civil actions against the employer and/or the perpetrator, the agency can certify based on the facts they found in their investigation that constitutes a U visa criminal activity.

The certifiers we consulted both sign U visa certifications and conduct trainings for police, prosecutors, judges and other potential certifiers on the U visa program and U visa certification. These certifiers regularly take questions and mentor agencies and judges considering certification on the U visa program, statutes and regulations. These certifiers have a lot of experience with the misconceptions many agencies that can sign U visa certifications have about the U visa certification process.⁸⁸ Law enforcement and prosecutor certifiers told NIWAP that they had found the 2015 Guide and the U visa regulations and preamble particularly helpful in explaining to new jurisdictions in rural areas and in communities with smaller immigrant populations about U visas and how to do certification. They felt that the new guide would not be helpful to jurisdictions who were newly considering U visa certification and would result in greater numbers of jurisdictions deciding not to certify. This result would be contrary to the purpose of the statute and is inconsistent with the goals of the November 2018 International Association of Chiefs of Police Resolution “Support for Education and Awareness on U Visa Certifications and T Visa Declarations.”⁸⁹

NIWAP consulted with certifiers who felt that the 2019 Guide Resource Guide left out critical information that agencies who do not have large certification programs need. This 2019 Guide creates confusion about issues that are clear in the statute and regulations that law enforcement agencies new to certification struggle with and the 2019 Guide will make matters worse. These problems are amplified by the 2019 Guide’s statements about the need to comply with local department policies and its failure to state that those policies should be developed to be consistent with and not add requirements that are not included in and that differ from the U visa statute and regulations. The 2019 Guide read by itself and not read in conjunction with the 2015 T and U Visa Certification Guide will have the effect of encouraging local jurisdictions to

⁸⁸ For details on many of the common misconceptions about certification and the position DHS takes in the 2015 Guide and the statute and regulations regarding these issues, see Attachment A: <http://niwaplibrary.wcl.american.edu/pubs/dhs-answers-to-reasons-for-not-certifying/>.

⁸⁹ See Attachment B: IACP – Support for Education and Awareness on U Visa Certifications and T Visa Declarations <http://niwaplibrary.wcl.american.edu/pubs/iacp-support-for-education-and-awareness-on-u-visa-certifications-and-t-visa-declarations/>.

develop certification policies that are directly contrary to the U visa statute, regulations and goals. These policies result in making communities less safe because it becomes more difficult to fight crime without the helpfulness immigrant victims participating in the U visa program provide.

One prosecutor NIWAP works with described the problems the guide creates for prosecutors as follows: “the law enforcement officers I work with are already reluctant to certify, and this pushes them against any willingness to help. Police officers do not read regulations and only read statutes to the extent required. This guide puts additional burdens on certifiers. It also misses opportunities to clarify. For example, the old guide included language saying that certification was NOT endorsing a victim or was not a guarantee that the immigrant victim would receive legal immigration status through the U visa. From a prosecutor’s perspective, it is much harder if you know that police officers who should be certifying will not do so.” The result will be less immigrant victims coming forward and less ability to prosecute perpetrators in our community.

A law enforcement official commented that particularly when there are a lot of small towns where police rarely receive applications for U-Visa certification. When they receive a request, the DHS 2015 Resource Guide provided them clear direction. This 2019 Guide on first impression discourages certification and encourages them to exercise their discretion not to certify. It does not emphasize the community, victim and officer safety benefits of the U visa and the community policing benefits in building trust with immigrant communities that come from building certification programs.

It is also important that since the U visa certifier must be a supervisor or the police chief, the certifying official is not the person who is talking with the victim or who has a relationship with the victim. This 2019 Guide does not include the reminders of the personal aspect of the victim’s needs or an understanding of the dynamics of victimization that is included in the statute, the regulations and the DHS published 2015 T and U Law Enforcement Resource Guide.

There was concern that when an agency has not received adequate training on domestic violence, certifiers will rely on this 2019 Guide “short version” that professes to reflect a victim oriented point of view but actually leaves out the victim’s needs and viewpoint. For certifiers who do not already have that specialized expertise or training in detecting the dynamics of family violence, they will not see the weaknesses in this 2019 Guide and could be misled by it. They could end up denying certifications to victims with valid U visa cases who have provided helpfulness and should be entitled to receive certifications.

Misleading As to the Regulations Definition of “Investigation or Prosecution”

The 2019 Guide places a heavy emphasis on criminal investigations and prosecutions and fails to consistently describe the full definition of “investigation or prosecution” included in the U visa regulations. The U visa regulations state that “[i]nvestigation or prosecution refers to the detection or investigation of a qualifying crime or criminal activity, as well as to the prosecution, conviction or sentencing of the perpetrator of the qualifying crime or criminal activity.”⁹⁰ The

⁹⁰ 8 C.F.R. 214.14(a)(5).

regulations included detection because the U visa statute in section 1512(a)(2) states that the U visa will “strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases...”⁹¹ In discussing the fact that the U visa statute made judges certifiers, the U visa regulations recognized that judges do not investigate or prosecute criminal activities and that judges certify U visas based on detection or conviction or sentencing.⁹² The judges we consulted were particularly concerned that the emphasis of the 2019 Guide, with few exceptions on “investigation or prosecution,” is a particularly clear illustration of how the Guide does not speak to judges as certifiers although they are explicitly listed as certifiers in the U visa statute. The judges, law enforcement and prosecution certifiers we consulted with were disturbed by the fact that the 2019 Guide fails to consistently state that a victim’s helpfulness can be as the regulations state in the detection or investigation or prosecution or conviction or sentencing of the criminal activity. Removing detection, conviction and sentencing will have a very troubling impact on the effectiveness of the U visa as a tool that encourages government entities to sign certifications and build trusting relationships with crime victims in immigrant communities.

2019 Guide Conflates “Helpfulness” with “Assistance”

The U visa statute requires that in order to apply for a U visa, victims must receive certification attesting to the fact that the victim has been, is being or is likely to be helpful in the investigation or prosecution of criminal activity.⁹³ The regulations define investigation or prosecution in the state to include helpfulness in the detection, prosecution, conviction, or sentencing of the criminal activity that was perpetrated against the immigrant victim.⁹⁴ Congress designed the U visa statute⁹⁵ and the U visa regulations⁹⁶ to encourage certification very early in the case once the victim has provided helpfulness or it was determined that the victim is likely to be helpful.⁹⁷ Further, in order to encourage helpfulness, the statutory scheme contemplated that victims could obtain certification when a certifying agency believed that the victim was likely to provide helpfulness in the future.⁹⁸

Once the victim obtained a certification based on their past helpfulness, present helpfulness, or likely future helpfulness and the victim filed their U visa application, the U visa regulations imposed a responsibility upon the U visa applicant/recipient to provide ongoing assistance when reasonably requested.⁹⁹ The victim’s obligation to provide assistance was to the government

⁹¹ See Victims of Trafficking and Violence Protection Act of 2000, div. B, Violence Against Women Act of 2000, tit. V, Battered Immigrant Women Protection Act of 2000, Pub. L. 106–386, sec. 1513, 114 Stat. 1464, 1533–37 (2000), amended by Violence Against Women and Department of Justice Reauthorization Act of 2005 (VAWA 2005), tit. VIII, Pub. L. 109–162, 119 Stat. 2960 (2006), amended by Violence Against Women and Department of Justice Reauthorization Act—Technical Corrections, Pub. L. 109–271, 120 Stat. 750 (2006); New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. 53,014, 53,015 (2007).

⁹² New Classification for Victims of Criminal Activity, 72 Fed. Reg. Vol. at 53,020 (2007).

⁹³ 8 U.S.C. 1184(o)(1).

⁹⁴ 8 CFR § 214.14(a)(5).

⁹⁵ 8 U.S.C. §§ 1101(a)(15)(U)(i)(III), 1184(o)(1).

⁹⁶ 8 C.F.R. 214.14(a)(12).

⁹⁷ “USCIS interprets ‘helpful’ to mean assisting law enforcement authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.” 53019 Fed. Reg. Vol. 72, No. 179. (2007); “8 U.S.C. 1101(a)(15)(U)(i)(III). The requirement was written with several verb tenses, recognizing that an alien may apply for U nonimmigrant status at different stages of the investigation or prosecution. By allowing an individual to petition for U nonimmigrant status upon a showing that he or she may be helpful at some point in the future, USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.” 53019 Fed. Reg. Vol. 72, No. 179. (2007).

⁹⁸ New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,019.

⁹⁹ 8 C.F.R. § 214.14(b)(3).

agency certifying the U visa¹⁰⁰ who was responsible for detection, investigation, or prosecution of the criminal activity when reasonably requested.¹⁰¹ Under the U visa statute, victims are exempted from the requirement to provide ongoing assistance when the request for assistance is not reasonable and when the victim’s failure to provide ongoing assistance is not unreasonable.¹⁰² Under the U visa statute, victims who did not unreasonably refuse to comply with reasonable requests for assistance are eligible to receive U visas and to receive lawful permanent residency as U visa holders.¹⁰³

In determining whether a victim’s refusal to cooperate was not unreasonable, adjudicators are required under the regulations to consider the totality of the circumstances in the U visa victim’s case.¹⁰⁴ Determinations about whether a victim’s failure to provide assistance was unreasonable must be decided –

“under the totality of the circumstances based on all available affirmative evidence ...may take into account such factors as general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe traumatization (both mental and physical), and the age and maturity of the applicant.”¹⁰⁵

The U visa statute and regulations make clear that a U visa victim may obtain certification upon provision of helpfulness early on in the victim’s case. Certification is based on the victim having been, being helpful or when the victim is likely to be helpful. Once the victim has filed their U visa case, through adjudication, and while in U visa status through the victim’s application for lawful permanent residency the regulations impose a requirement that the victim provides continued assistance to the certifier’s agency in the investigation or prosecution of the criminal activity. Recognizing the difficulties victims encounter due to trauma and ongoing threats and danger from the perpetrator, the U visa statute allows the victim to obtain their U visa and lawful permanent residency so long as the victim can prove that they did not unreasonably refuse to provide assistance reasonably requested. There is a clear distinction between the “helpfulness” standard that applies for purposes of obtaining certification and the “assistance” required after the victim files for and after the victim obtains their U visa. It is this distinction that is clear from the statute and the regulations that the 2019 Resource Guide appears to either not understand or may intentionally misrepresent in an effort to discourage and create impediments to certification.

¹⁰⁰ “This rule provides that the official or authority receiving the assistance be a ‘certifying agency,’ as defined in new 8 C.F.R. 214.14(a)(2).” New Classification for Victims of Criminal Activity; Eligibility for “U” Nonimmigrant Status, 72 Fed. Reg. at 53,019, 53,023.

¹⁰¹ 8 C.F.R. §§ 214.14(b)(3), 245.24(e)(ii).

¹⁰² 8 C.F.R. §§ 245.24(b)(5), (e)(1), (e)(2)(ii), (e)(4).

¹⁰³ 8 U.S.C. 1255(m)(1); Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, 73 Fed. Reg. at 75,547.

¹⁰⁴ 8 C.F.R. § 245.24(a)(5).

¹⁰⁵ *Id.*

The U visa certification experts and officials in law enforcement and prosecution agencies and the judges whom NIWAP asked to review the 2019 Guide were disturbed by how the 2019 Guide replaces the statutory standard of “helpfulness” with “assistance” which is a higher standard that under the U visa regulations and statute applies after the victim has obtained certification and has a pending U visa application. Assistance is a higher standard than required for certification. The substitution of “helpfulness” with “assistance” is not legally accurate and imposes a barrier that will increase reluctance to certify among agencies authorized to certify. They stressed that helpfulness is all that is needed for certification and it promotes the early certification Congress envisioned in the statute. Requiring proof of assistance at a much higher degree of cooperation is harder to define than helpfulness which undermines certification and makes training of certifiers more difficult. Many law enforcement investigators will not understand the law’s helpfulness requirement. When read, the 2019 Guide’s use of the term “assistance” or “assisting” will be a tough burden for victims to meet to be able to secure certification. This is directly contrary to the U visa program’s goals as expressed in the statute and the regulations.

The approach the guide takes imposing assistance instead of helpfulness is one important illustration of the extent to which the 2019 Guide reflects a failure of the authors of the guide to understand the dynamics of domestic violence, sexual assault, human trafficking and crime victimization suffered by immigrant victims. Judges who are experts in domestic and sexual violence dynamics observed that the 2019 Guide does not take a victim-centered approach. USCIS and DHS need to understand that there are rational reasons why a victim would not show up in court due to fear, witness tampering, intimidation, threats and retaliation from the perpetrator. The victim may not be able to safely participate in the criminal investigation or prosecution. Instead of being victim oriented and victim-centered the 2019 Guide places many additional burdens on victims that do not exist in the U visa statute and regulations.

Replacing “Incompetent” and “Incapacitated” With “Disabled”

Judges we spoke to noted that this 2019 Guide replaced the terms incompetent and incapacitated,¹⁰⁶ which are used in the U visa regulations to describe individuals for whom a family member or next of kin can provided helpfulness with the terms disabled or disability on pages 6 and 7. Persons who are incompetent and incapacitated may or may not be disabled so the use of this term to substitute for incompetent or incapacitated is legally inaccurate.

The 2019 Resource Guide Suggests a Statute of Limitations Not Authorized By the U Visa Statute

An important issue of concern to law enforcement and judicial certification experts and trainers who reviewed the 2019 Guide was the fact that on pages 6 and 10, the 2019 Guide suggests that statutes of limitations could be in some way relevant to the decision of whether to

¹⁰⁶ 8 C.F.R. §§ 214.14(a)(7), 214.14(b)(2).

sign a U visa certification. This language on pages 6 and 10 should be replaced with a clear statement that under the U visa federal law statutes of limitation do not apply. The U visa statute, in discussing helpfulness states that to be eligible for a U visa an immigrant must demonstrate helpfulness defined as:

“has been helpful, is being helpful, or is likely to be helpful to a Federal, State, or local law enforcement official, to a Federal, State, or local prosecutor, to a Federal or State judge, to the Service, or to other Federal, State, or local authorities investigating or prosecuting criminal activity”¹⁰⁷

This statutory language is crystal clear and not vague in any way. The immigrant victim qualifies for a U visa if they have offered helpfulness at any point in the past, if they are currently being helpful, or if the certifier believes that the victim is likely to be helpful in the future. To meet the helpfulness requirement under the statute, victims need only meet one of these three helpfulness options and need not meet more than one. Many victims will seek certification based on meeting more than one of these helpfulness requirements. Although pages 6, 10, and 11 state that the regulations do not set a specific statute of limitations for signing certifications, this is misleading. There is no statute of limitations set in the regulations because the statute on its face by its use of past, present, and future tenses in discussing helpfulness explicitly precludes imposing a statute of limitations for certification or filing of a U visa. Any regulation that attempts to impose a statute of limitations would be subject to legal challenge that is not likely to be upheld in a court of law. USCIS on its website as of September 26, 2019 and in its prior publications on the U visa programs including the 2015 Resource Guide states that, “There is no federal statute of limitations on when a crime occurred and when a victim may be eligible for these immigration benefits.”¹⁰⁸

Injecting confusing language into the 2019 Guide that could be interpreted to encourage certifying agencies to decide to impose limitations on the availability of certifications related to deadlines after the crime or after helpfulness that was last offered that are not present or authorized by the U visa statute or regulations is misleading. The statute imposes no time limitations on how long after the abuse or how long after the victim has provided helpfulness certification can be requested. Congress chose to impose no time limits and no statute of limitations based on an understanding about how isolation, coercive control, limited English proficiency, whether and when government officials inform immigrant victims about the U visa, and victims' need to heal following trauma could affect when a victim first learns about the U

¹⁰⁷ 8 U.S.C. § 1101(a)(15)(U)(i)(III).

¹⁰⁸ United States Citizenship and Immigration Services, *Information for Law Enforcement Agencies and Judges: Important Things to Remember*, <https://www.uscis.gov/tools/resources/information-law-enforcement-agencies-and-judges>; See also 2015 Guide at pages 7 and 19 (discussing that there is no statute of limitations related to certification or declarations or applications in the T and U visa programs).

visa, and victims' ability to safely act on this information. The 2019 Guide should be amended to remove these misleading statements. Removing the language in the 2019 Guide stating that this USCIS Guide supersedes the DHS 2015 Resource Guide would also help resolve this problem.

Clarification Needed That Substantial Harm Determinations Are NOT Part of Certification

The judicial, law enforcement and prosecution experts and trainers on the U visa also express concern that the way the 2019 Guide is drafted on page 5 and particularly page 8 leaves the reader new to certification with the impression that they should consider declining certification if they do not observe substantial harm. While on page 5 the 2019 Guide states that certification does not focus on this area read together with page 8 it could be clearer. The U visa regulations are very clear on this point. The U visa regulations require proof of substantial physical or mental abuse from the victim applicant 8 C.F.R. 214.14(c) (2)(ii). Certifiers are not required to address substantial abuse 8 C.F.R. 214.14(c)(2)(i). but including this information can be helpful to the victim. The U visa regulations require that the victim establish proof of substantial abuse using any credible evidence and do not require that certifiers consider substantial harm to be able to certify. The U visa certification form (Part 3. Number 7) provides certifiers an opportunity to submit evidence that can help the victim prove substantial abuse.

The language on page 15 of the 2019 Guide is helpful in stating that USCIS is responsible for making determinations as to whether the victim has met the “substantial physical or mental abuse” standard and contains a fairly good discussion of the factors USCIS must consider in its adjudication of this issue. The full list of factors that USCIS must consider are included in the U visa regulations.¹⁰⁹

Conclusion

NIWAP urges DHS to amend the 2019 Guide to be accurately reflect the language of and the U visa statute and regulations and to be consistent with the legislative and regulatory history, goals, and purpose of the U visa statute. We also seek confirmation that the 2019 Guide is a USCIS publication that does not replace the November 2015 T and U Resource Guide published by DHS. This would require removing the statement on page i of the 2019 Guide that states “This Guide supersedes all previous versions of the U and U/T Visa Law Enforcement Resource Guides.” Additionally, as DHS considers the steps it should take with regard to the 2019 Guide

¹⁰⁹ For the full list of factors to be considered under the regulations s 8 C.F.R. 214.14(b)(1) which in addition to the above states that the analysis includes consideration of "aggravation of pre-existing conditions. No single factor is a prerequisite to establish that the abuse suffered was substantial....A series of acts taken together may be considered to constitute substantial physical or mental abuse even where no single act alone rises to that level" The Federal Register DHS Docket No. USCIS-2006-0069 page 53018 The Federal Register also states that: Through these factors, USCIS will be able to evaluate the kind and degree of harm suffered by the individual applicant based upon that applicant's individual experience....USCIS recognizes the possibility that some victims will have a pre-existing physical or mental injury or condition at the time of the abuse. In evaluating whether the harm is substantial, this rule requires USCIS to consider the extent to which any pre-existing conditions were aggravated. Id. Some abuse may involve a series of acts or occur repeatedly over a period of time. USCIS will consider the abuse in its totality to determine whether the abuse is substantial.

NIWAP

we strongly urge DHS to consult with stakeholders who include the judges, police and prosecutors with expertise on U visa certification listed in Attachment C. We request that a meeting and listening session with these stakeholders be convened so that the experts may express their views on the 2019 Guide and the impact it will have on the effectiveness of the U visa in promoting access to justice and fighting crime in communities across the country.

I would also welcome the opportunity to discuss and provide additional information and answer questions regarding this letter, the 2019 Guide, the U visa legislative history and purpose, the U visa regulations and the research demonstrating the purpose behind, the need for and the effectiveness of the U visa program. Please do not hesitate to contact me regarding this letter or any of its attachments. I can be reached at 202-210-8886 or orloff@wcl.american.edu.

Sincerely,



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