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ARTICLES

- Gene A. Trevino, Ph.D. **Abuse of the Multiattribute Utility Model: A Case Study in Assessing Personal Goodwill**
- Robert F. Reilly **The Asset-Based Approach to Business Valuation in Family Law (Part III of III): The ANAV Method**
- Margaret "Pegi" Price and Jack Hamlin **The Costs of a College-Bound Special Needs Child After Divorce**
- Mark E. Sullivan **Fixing the Frozen Military Benefit Award (Part III of III)**
- Rebekah A. Smith, CPA, CVA, MAFF, CFF and Mallory M. Mohler, CPA **Champagne Lifestyle on a Beer Budget**
- Kendall Niles, Veronica Thronson, and Leslye Orloff **Understanding the Judicial Role in U Visa Certification**

DEPARTMENT

- Gregg Herman **Litigation: Third-Party Decision-Making in Family Law**

FEATURES

- Ron Brown ***Fairshare* Cases: Trust Distributions—Support Income; HSA Funds; Genetic Testing; Cattle; Pension; Unvested Stock Options—Alimony; Dissipated Assets; Shared Custodian's Move; Prenup-Signatures...**

Family Law Review Articles

INDEX

Understanding the Judicial Role in U Visa Certification

BY KENDALL NILES, VERONICA THRONSON, AND LESLYE ORLOFF

As an important part of the Violence Against Women Act (VAWA) of 2000 Congress created the U visa¹ to offer immigration relief and protection from deportation for immigrant crime victims who muster the courage to come forward and avail themselves of help from the criminal and civil justice systems.² Significant bipartisan efforts resulted in the creation of the U visa in 2000³ as well as improvements to the U visa program included in congressional amendments as part of VAWA reauthorizations in 2005⁴ and 2013.⁵

This article discusses the role that Congress created for state and federal court judges as U visa certifiers and the US Department of Homeland Security's (DHS) implementation and articulation of this statutorily created role.⁶ First, this article provides an overview of the eligibility requirements, the application and adjudication process, and the benefits that it provides to victims of qualifying criminal activity.⁷ It contextualizes the U visa by addressing its legislative history and congressional intent.

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Next, based on the statute, DHS regulations, policies, and publications this article will discuss what certification is and is not in the context of its role in the U visa application process, dispelling common myths and inaccurate descriptions of U visa immigration laws prevalent in state and federal court cases discussing the U visa. These include misperceptions among agencies authorized to certify and courts that signing a certification is an adjudication of the U visa or an endorsement of eligibility or character of the applicant as opposed to a required piece of evidence in a victim's U visa case. This article then discusses when, and the range of court case types in which, the U visa statute authorizes judicial certification, judicial certification best practices, and how judicial certification of U visas is best accomplished consistent with judicial ethics and codes of conduct.⁸

The U Visa is a bipartisan effort by Congress.

U VISA OVERVIEW

The U visa is the product of a bipartisan effort in Congress to create both a crime-fighting tool and humanitarian relief for crime victims.⁹

Legislative History and Purpose

Upon introducing VAWA 2000, then-Sen. Joe Biden (D-Del.) stated:¹⁰

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 immoral choice.

VAWA 2000 was a bipartisan effort led by Senators Biden (DE), Hatch (UT), Kennedy (MA), and Abraham (MI) who worked together to craft the immigration protections as well as many other provisions in the bill.¹¹ Upon passage of the final VAWA 2000 bill containing the new U visa relief for immigrant crime victims, then-Senator Biden emphasized the importance of the battered immigrant women provisions of the bill. Senator Biden stated:¹²

... [M]aybe the single most important provision we add to the Violence Against Women Act is the battered immigrant women provision. This strengthens and refines the protections for battered immigrant women in the original act and eliminates the unintended consequence of subsequent charges in immigration law to ensure that abused women living in the United States with immigrant victims are brought to justice and the battered immigrants also escape abuse without being subject to other penalties.

When Congress included the U visa as Section 1513 of the VAWA 2000, it chose to formally include in the statute a legislative code section that explicitly stated the congressional intent of this important bipartisan effort. Section 1513(a) provides the cornerstone of the U visas legislative history stating:¹³

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.

(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 agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. 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.

DHS has implemented the U visa in a manner that has been consistent with this congressional

intent. In VAWA 2000, Congress created the U visa with the purpose of strengthening law enforcement agencies' ability to investigate and prosecute crimes.¹⁴ In order to reach this goal, the U visa offers protections that provide temporary lawful immigration status to qualifying victims of certain criminal activities.¹⁵ With temporary legal immigration status and work authorization, victims' safety and stability improves allowing victims to better cooperate with police and prosecutors.¹⁶ Proper use of the U visa provides invaluable benefits to law enforcement officers and the entire criminal justice system.¹⁷ As a vital crime-fighting tool, the U visa advances access to justice for immigrant crime victims and facilitates immigrant crime victim participation in the criminal, family and civil justice system.¹⁸

The U Visa offers temporary lawful immigration status.

Particular Vulnerability of Immigrant Women and Children

Immigrant women and children are particularly vulnerable to crimes and exploitation covered by the U visa, such as human trafficking, domestic violence, sexual assault, stalking, and other crimes.¹⁹ This is due to a variety of factors, including, "language barriers, separation from family and friends, lack of understanding of U.S. laws, fear of deportation, and cultural differences."²⁰ Domestic violence, sexual assault and human trafficking account for approximately 75 percent of U visa cases filed.²¹ Through the creation of the U visa, Congress sought to both prosecute perpetrators of crimes committed against immigrants and strengthen relations between law enforcement and immigrant communities.²² The preamble to the U visa regulations states:

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.²³

In issuing the U visa regulations, the US Citizenship and Immigration Services (USCIS) recognizes that the U visa is a tool for law enforcement

to better serve crime victims.²⁴ Without legal immigration status, immigrant crime victims may be reluctant to report criminal activity or assist in an investigation or prosecution for fear of putting themselves at risk of removal²⁵ from the United States.²⁶ The U visa is designed to counter the victim's fear of deportation by offering them temporary legal immigration status, which encourages the reporting of crimes to law enforcement.

The U Visa is designed to counter the victim's fear of deportation.

Perpetrators of crimes against immigrant victims are actively engaged in efforts to report victims to immigration enforcement authorities so that perpetrators can elude criminal prosecution or gain an advantage in civil or family law cases.²⁷ Thus, the U visa has been designed to help curtail the success of such actions by perpetrators.²⁸ Obtaining a U visa certification is a prerequisite to a victim's ability to file an application. The certification is a piece of mandatory evidence that is part of the U visa application filed with USCIS.²⁹ Once the victim attains the U visa certification and files the application, the victim's case is entered into a special VAWA confidentiality system that red flags the case and warns DHS enforcement officials, in the event the victim becomes the target of DHS enforcement actions, that the individual has a pending, approved, *prima facie* or *bona fide* determination in a VAWA, T visa, U visa, or battered immigrant spouse of a work visa holder case.³⁰

In addition to being a crime-fighting tool for law enforcement, a primary purpose of certification is to promote participation of immigrant crime victims in the justice system.³¹ Lack of lawful immigration status can be a major factor in victims' decisions not to contact law enforcement to report crimes.³² Perpetrators will often use the immigrant victim's lack of legal status as a means to exploit and control them.³³ Having understood the helpfulness provided when victims report and otherwise aid in the detection of crimes,³⁴ Congress designed the U visa so as to ensure that certification is not conditioned upon the occurrence of any specific event and is not tied to how the case proceeds, in what stage of a proceeding the case is, or whether the case goes forward at all.³⁵

The primary purpose of the U visa is to encourage reporting of criminal activity. This purpose is

not limited to allowing victims to remain available as witnesses for the prosecution of a criminal case, as was mischaracterized by the North Carolina Judicial Standards Commission's Advisory Opinion in 2014.³⁶ Although promoting participation as a witness is certainly one of the benefits to law enforcement, U visas are legally available to immigrant victims who assist government officials in detection, investigation, prosecution, conviction, or sentencing of any U visa criminal activity.³⁷ Narrowly construing the U visa to be limited to immigrants needed to testify or who testify as witnesses in a criminal case misunderstands the true intention behind the U visa as both a tool for law enforcement, prosecutors, and the courts and a tool to furthering the humanitarian interests of the United States.³⁸ Promoting access to justice and participation in criminal, family, and civil court cases is an excellent example of efforts that comport with congressional intent in furthering the humanitarian interests of the United States. The U visa scheme serves to facilitate cooperation in the detection, investigation, prosecution, conviction, or sentencing of criminal activity by immigrant crime victims without fear of deportation.³⁹ The North Carolina opinion also mischaracterized the U visa status as a preferential status under the law.⁴⁰ Rather, the U visa is a temporary visa affording non-immigrant legal status, allowing holders to remain and work in the United States for, generally, four years.⁴¹ After four years, if certain conditions are met, U visa holders may qualify to apply for lawful permanent residence.⁴²

Eligibility and Requirements

The U visa is designed to "strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes... while offering protections to victims of such offenses in keeping with the humanitarian interests of the United States."⁴³

This visa provides immigration relief for immigrants who suffer "substantial physical or mental abuse" as a result of certain criminal activity perpetrated against them.⁴⁴ An individual is eligible for a U visa if the following conditions are met:

- The individual is a victim of a qualifying criminal activity.
- The victim possess information about the criminal activity.

- If under the age of 16 or unable to provide information due to a disability, incapacity, or incompetence, a parent, guardian, or next friend may possess the information about the crime and provide it on the victim's behalf.⁴⁵
- The victim was helpful, is helpful, or is likely to be helpful to government officials in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity of which the immigrant is a victim.
 - If under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the crime on his or her behalf.⁴⁶
- Each U visa application must include a certification from one of the government officials authorized by DHS corroborating the victim's helpfulness.
- The crime occurred in the United States or violated U.S. laws.

Additionally, the victim must prove the following to DHS:

- The victim has suffered substantial physical or mental abuse as a result of having been a victim of criminal activity.
- The victim is admissible⁴⁷ to the United States.
 - If the victim is not admissible, the victim may apply for an inadmissibility waiver from DHS as part of the U visa application.⁴⁸

The criminal activity is that involving one or more of the following or any similar activity in violation of federal, state, or local criminal law: rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; stalking; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt;

conspiracy; or solicitation to commit any of the above mentioned crimes.⁴⁹

In order to be eligible for a U visa the petitioner must provide a U visa certification,⁵⁰ which supplies DHS with evidence that the victim was, is, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of one, or multiple, of the criminal activities listed in the U visa statute.⁵¹ The DHS regulations, policies, and resource publications all confirm that as a matter of federal immigration law the statutory term "investigation or prosecution" is to be interpreted broadly to include assisting with detection of criminal activities.⁵² Common examples of assistance in the detection of criminal activities can include calling the police for help, providing information to police and prosecutors, seeking a civil protection order, providing evidence of domestic violence, child abuse, sexual assault, or other U visa criminal activity in a custody case. The phrase "investigation or prosecution" has also been defined in the U visa regulations to include assistance offered in a criminal case that may lead to a conviction and assistance in the sentencing phases of proceedings because they lead to or extend from the criminal investigation and prosecution.⁵³

The primary purpose is to encourage reporting of criminal activity.

The term "helpfulness" has a broad definition and can take numerous forms. A petitioner meets this requirement by providing information and assistance reasonably requested by law enforcement or prosecution.⁵⁴ Once a victim has been helpful or offered helpfulness, certification is available for the victim even if the case is dismissed, does not go to trial, the defendant pleads guilty, police do not take the case to prosecutors, the prosecutor chooses not to prosecute, or the victim is not called as a witness if there is a trial.⁵⁵ Further, "[l]aw enforcement agencies can sign a certification even if no prosecution, arrest, or conviction has been made, and even if the case is closed. Formal charges or the launch of a formal investigation is not required."⁵⁶

A completed U visa certification Form I-918 Supplement B must be submitted as a required piece of evidence in the victim's U visa application.⁵⁷ Applications filed without certifications will be rejected as incomplete.⁵⁸ The I-918 Supplement B

certification form alone does not grant any immigration benefit.⁵⁹

Signing a certification is not an adjudication of the U visa. In DHS's *Resource Guide* for governmental U visa certifiers, DHS states that Supplement B is "a required piece of *evidence* to help demonstrate that:

- Qualifying criminal activity has occurred;
- The victim has information about the criminal activity; and
- The victim was helpful, is being helpful, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of criminal activity."⁶⁰

The certification does not guarantee that the U visa petition will be approved by USCIS.⁶¹ Likewise, the certification is not conclusive evidence of eligibility for the U visa.⁶²

In addition, the *DHS Resource Guide* states that:⁶³

Without a completed and signed U visa certification, the victim will not qualify for a U visa, as it is a required part of the application, and there is no exception to this requirement. However, by signing a U visa certification, the certifying agency, official, or judge is not sponsoring or endorsing the victim for a U visa, and the completed certification does not guarantee that USCIS will approve the U visa petition. USCIS considers the U visa certification as only one part of the evidence in support of the U visa petition. USCIS determines the victim's credibility and whether to approve the petition based on the totality of the evidence and circumstances of each case.

Federal and State Roles

The U visa scheme that Congress created establishes distinct roles for federal and state officials. Generally, the federal government had broad power over US immigration law under the US Constitution.⁶⁴ "Federal governance over immigration and alien status is extensive and complex."⁶⁵ But this comprehensive federal role in adjudicating immigration matters does not mean that other persons and institutions have no role. State officials, including judicial officers, police, and prosecutors, often play a supporting, but central and formal, role in the federal adjudication of U visa applications.

As analyzed more fully in the following sections, government agencies and judicial officers who have authority under federal law to sign certifications are not legally required to sign a certification and whether to certify is at the discretion of each certifying agency or judicial officer.⁶⁶ The certifying agency should make certification determinations on a case-by-case basis while remaining consistent with congressional purpose, applicable law, and DHS regulations and policies.⁶⁷ Although there is no legal obligation for a certifying officer or agency to complete a certification, it is important to consider that without a certification, any U visa application filed will be rejected by USCIS as incomplete because the filing did not include the required certification.⁶⁸ In many cases, the helpfulness of the victim is well-established in the evidence of the case and uncontested. However, the formality of a signed certification is required for USCIS to consider a U visa application complete.

"Helpfulness" has a broad interpretation.

The certifier is not liable for a victim's future conduct or criminal actions.⁶⁹ By signing the certification the certifier is not vouching for the victim's character.⁷⁰ A certifier may also withdraw or disavow a certification at any time after signing if the victim unreasonably refuses to continue to cooperate.⁷¹ Without the certification, the federal process is undermined and the goals of the federal legislation are subverted.

DHS officials charged with implementing US immigration laws are best positioned to see the entire U visa application process and its various components. They are the experts on VAWA's protections for immigrant victims of crime including the U visa protections for victims of criminal activity.⁷² The complexity of US immigration laws is enhanced in those areas of immigration law in which implementing regulations have not kept up with subsequent statutory reforms. The VAWA immigration provisions, including the U visa are excellent examples of this problem. To address emerging needs for victim protection and to enhance the effectiveness of criminal investigations and prosecutions of perpetrators of crimes against immigrants, Congress has, over the course of more than two decades, made improvements to VAWA's crime victim protections. VAWA's immigration

protections, which were originally enacted in 1994,⁷³ have been amended, first in 1996⁷⁴ and then three more times as part of the Violence Against Women Acts of 2000,⁷⁵ 2005,⁷⁶ and 2013.⁷⁷ These amendments included the creation of the U visa in 2000 and improvements to the U visa's statutory protections in 2005 and 2013.

As immigration statutes are amended, often portions of DHS's implementing regulations are overruled by statute, and it can take many years for DHS to issue new regulations to reflect statutory changes that have been enacted in the intervening years since the original regulations were published. To address this issue, DHS issues policy guidance, adjudicator's field manuals, and publications designed to implement statutory reforms while DHS is in the process of updating its regulations. The U visa and the VAWA self-petitioning programs are two examples of areas of immigration law in which policy memos and DHS publications fill the gaps in implementing the VAWA self-petitioning and U visa program's most recent statutory changes governing adjudications of VAWA and U visa immigration cases while the regulations are being updated.

Signing a certification is not an adjudication of status.

When the intent of Congress is clear, courts will apply the plain meaning rule of statutory interpretation; however, when congressional intent is unclear, courts should defer to the relevant federal agency.⁷⁸ With regard to U visa certification, the U visa statutes list judges as one of the government agencies authorized to sign U visa certifications.⁷⁹ However, the statute itself provides little additional clarifying guidance to certifiers, leaving many ambiguities on the U visa certification process and requirements. DHS, the agency charged with implementing the U visa certification and the U visa program, has issued regulations,⁸⁰ policies, and publications that provide courts and certifying agencies answers to myriad questions that typically arise in relation to the U visa and U visa certification.

Two-Prong Test

In *Chevron*, the US Supreme Court created a two-prong test to determine when courts should defer

to an agency's interpretation of a statute. First, the court has to determine whether the statutory language in question is ambiguous and should apply the plain meaning of the language if it determines that the language is not ambiguous, irrespective of the agency's interpretation. If the court determines that the statutory language in question is ambiguous, it must defer to the agency's interpretation so long as it is a reasonable one.⁸¹ In *Chevron*, the Supreme Court ruled in favor of giving deference in statutory interpretation, when the intent of Congress is unclear, to the administrative agency tasked with enforcing the legislation.⁸² The Court stated:⁸³

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute... Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron deference is not a broad grant of deference to federal agency interpretations of ambiguous statutes. Deference must be given only in instances in which the ambiguity "constitutes an implicit delegation from Congress to the agency to fill in statutory gaps."⁸⁴ Delegation of authority from Congress can "[b]e shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent."⁸⁵

A certifying judge is not sponsoring or endorsing a visa.

Skidmore established more generally applicable principles of deference to an agency's interpretation of a statute that the agency is responsible for implementing or enforcing. *Skidmore* found that although the agency's expertise is valuable in the court's analysis, it was not binding on a court that was adjudicating ambiguous language within that statute.⁸⁶

With regard to the U visa, DHS has received an implicit delegation from Congress to fill statutory gaps in the implementation of immigration laws. Before it could formally begin accepting U visa applications DHS twice conducted notice-and-comment rulemaking and issued U visa implementing regulations in 2007⁸⁷ and T and U visa adjustment of status regulations in 2008.⁸⁸ DHS also sought notice and comment on amendments⁸⁹ to the U visa application forms and U visa certification forms resulting in the issuance of new U visa forms in March of 2017.⁹⁰ Additionally, USCIS has issued a series of policy memoranda and DHS has issued training videos and training publications for U visa certifiers providing USCIS and DHS expertise answering questions from certifiers in the field on U visas. The information provided in these policies and publications is grounded in the regulations and the regulatory history of certification, and provides further additional detail and guidance. The breadth and depth of the information in the DHS regulations, regulatory history in the preambles accompanying the regulations, certification forms, form instructions, policy memoranda, and DHS' official publications and videos on the U visa must be afforded deference by courts responding to requests for certification.

Examples of "helpfulness" include calling 9-1-1 to report a crime.

JUDGES AS CERTIFIERS

The complex statutory, regulatory, and policy web related to U visas has made it difficult for many state and federal courts issuing rulings regarding U visa certification to issue opinions that fully and accurately reflect the laws governing the U visa program that are fully consistent with the congressional intent reflected in the statute and DHS expertise published in the regulations, preambles to regulations, policies, and training publications. As a result, when state and federal courts have issued opinions discussing U visa certification and the U visa program, the court's decisions often contain legal inaccuracies about the federal immigration laws that govern the U visa program.

The national review of U visa case law discussed in this article uncovers a number of areas

in which state and federal court decisions conflict with federal immigration laws, and DHS regulations, policies, and views on U visa certification. Misinterpretations of federal U visa immigration law contained in court opinions in some, but not all instances, have caused courts to reach decisions that are either inconsistent with or contrary to the U visa statute and its legislative and regulatory history.⁹¹ In other cases, misstatements of U visa immigration laws are *dicta* in courts opinions. When courts include legal inaccuracies about the U visa program in their opinions, other courts cite those opinions and the *dicta* they contain and rely on them as accurate statements about U visa laws. This pattern becomes "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"⁹² and undermines both the crime fighting and the victim protection goals of the Violence Against Women Acts enacted over a period of more than two decades.

Certification Is Not Adjudication

In several cases from jurisdictions nationally, courts have misconstrued judicial certification as an adjudication of the underlying immigration application. For example, in *Aguirre-Palacios v. Doe*, the Court conflated the act of certification with the act of adjudicating overall eligibility of the applicant for a U visa. The *Aguirre-Palacios* Court correctly recognized that its jurisdiction "does not extend so far as to confer further jurisdiction over questions of Plaintiff's eligibility for a U-Visa under 8 U.S.C. § 1101(a) (15)(U). The United States Citizenship and Immigration Services (USCIS) has sole jurisdiction over such relief."⁹³ However, it then incorrectly concluded that judges could not sign certifications, because it misconstrued the act of signing a certification to be adjudication of the U visa case, which certification is not.

The Court did not understand the difference between certification (the formal required mechanism for providing evidence to USCIS) and adjudication of the U visa application. Certification is not an adjudication of the applicant's eligibility for a U visa.⁹⁴ This decision ignores the fact that the U visa statute⁹⁵ and regulations⁹⁶ explicitly list judges as U visa certifying officials, in a carefully circumscribed role, as certifiers, and not as immigration adjudicators.

The *DHS Resource Guide* on U and T visas confirms that a certification is not an adjudication, stating:⁹⁷

Federal, State and local... agencies do not grant or guarantee a U visa or any other immigration status by signing a U visa certification (Form I-918B). Only USCIS may grant or deny a U visa after a full review of the petition to determine whether all the eligibility requirements have been met and a thorough background investigation.

By signing a U visa certification, the judge only certifies:⁹⁸

- The judge's identity;
- The judge's position as a judge, magistrate, commissioner, alderman, judicial referee, surrogate, master, chancellor,⁹⁹ or other government official authorized to sign U visa certifications;
- That the applicant is a victim of a "qualifying criminal activity";
- That the certifier is either detecting, investigating, prosecuting, convicting or sentencing;
- That the victim possesses knowledge concerning the criminal activity,¹⁰⁰ and
- The applicant's past or present helpfulness or likely future helpfulness in the detection, investigation, prosecution, conviction, or sentencing of one or more qualifying criminal activities.

In signing a U visa certification, the certifying judge is not sponsoring, endorsing, or granting the victim a visa.¹⁰¹ USCIS is the sole adjudicator of U visa petitions and a completed certification does not guarantee approval of the U visa by DHS officials.¹⁰² A signed certification does not confer on the victim legal immigration status. By signing a certification, a judge, or any other certifier, is not making any determination of the applicant's eligibility for a U visa.¹⁰³ The certification is a mandatory piece of evidence that must be filed as part of the victim's U visa application.¹⁰⁴ A certification provides evidence that the petitioner is a victim of a qualifying criminal activity and that the victim has been, is being, or is likely to be helpful in the detection, investigation, prosecution, conviction, or sentencing of that activity.¹⁰⁵

To be granted a U visa immigrant victims are required to prove to USCIS that they meet all

U visa eligibility requirements, which includes proof (e.g., of substantial harm, admissibility, and waiver eligibility) that goes beyond the information contained in the U visa certification.¹⁰⁶ USCIS also requires that all applicants for immigration relief undergo a full criminal and immigration background check using fingerprints. USCIS will review a U visa application in its entirety, which includes the U visa application form, the certification, an affidavit from the victim, and any other supporting evidence such as police reports, medical records, photos, court documents, and witness affidavits.¹⁰⁷ During the adjudication process, USCIS may elect to contact the certifying agency to ask whether the victim has continued to provide assistance that was reasonably requested or for other additional information.¹⁰⁸

Neither conviction nor prosecution is required.

In addition, as with every petitioner seeking immigration relief, an applicant for a U Visa must be admissible to the United States.¹⁰⁹ There are specific waivers of inadmissibility available to recipients of U visas if the Secretary of Homeland Security determines that such a waiver would be in the public or national interest.¹¹⁰ The U visa regulations provide extremely generous waivers of inadmissibility grounds for U visa petitioners; in general, most grounds of inadmissibility may be waived for a petitioner granted a U visa except for those who were participants in Nazi persecutions, or who committed acts of genocide, extrajudicial killings, or torture.¹¹¹

"Helpfulness" in the U Visa Context

Some courts have failed to fully consider the U visa regulations and DHS resources related to helpfulness.¹¹² For example, in *Torres-Lopez v. Scott*, the court denied a certification because "plaintiffs cannot be helpful to an investigation that does not occur and there is no indication that criminal investigation (let alone prosecution) of Defendants is likely."¹¹³ *Aguirre-Palacios v. Doe* also erroneously determined that there could be no certification by the presiding judge because the case was dismissed, and therefore the U visa certification request of the court was moot.¹¹⁴ Further, in *Nunez-Ramirez*, the court declined to issue a certification because the defendant pleaded guilty, resulting in

no trial, and the court found there was no basis to find whether the victim was actually helpful.¹¹⁵ The courts' conclusions in each of these cases fails to understand the U visa context, contradicts the published regulations, policies, and positions of DHS, and ignores the framework that federal immigration officials have established and implemented.

Government agencies with certain authority are authorized to certify.

The fact that a case did not go to trial does not negate the past helpfulness the victim provided, and a certification can still be completed even if the case did not go forward.¹¹⁶ This past helpfulness often includes but is not limited to calling the police for help, making a police report, and meeting with investigators and prosecutors. The certifying agency or official may still certify regardless of the outcome of the case.¹¹⁷ This includes, and is not limited to, instances in which the prosecutor decides not to prosecute, there is no indictment, or the case is dismissed.¹¹⁸ *Romero-Hernandez* wrongly ruled that because the case was dropped, the victim would not be able to show helpfulness because there was no pending investigation or prosecution.¹¹⁹ Such holdings seemingly ignore the past helpfulness that was provided by a victim in reporting the criminal activity and assisting in the detection, investigation, and prosecution of the case up to the point at which the prosecutors made the decision to drop the case.¹²⁰

Judicial officials will sign U visa certifications based on probable cause¹²¹ or the court's issuance of findings or court orders in a civil, criminal, or administrative law cases in which the court believes that the immigrant seeking U visa certification:¹²²

- Has been the victim of one or more U visa listed criminal activities;¹²³
- Possesses knowledge about the criminal activity;¹²⁴ and
- Is being, has been, or is likely to be helpful in one or more of the following: detection, investigation, prosecution, conviction, or sentencing of the criminal activity the victim suffered.¹²⁵

Courts have been advised by DHS that:¹²⁶

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

In the vast majority of cases when judges are asked to sign certifications, the victim will be able to demonstrate past or current helpfulness through the victim's involvement in the events that led up to the case coming to court to be heard before the judge. In criminal cases this may have involved calling the police for help, filing a police report, appearing at hearings on the criminal case, and testifying. In a civil case, including but not limited to civil protection orders, custody, or employment actions, helpfulness includes seeking a protection order, participating or filing cases against an abusive employer, or raising domestic violence or child abuse in a custody or divorce case. The vast majority of cases in which U visa applicants will seek judicial certification will be cases in which the victim has already demonstrated past or present helpfulness.

In some cases in which the victim's prior helpfulness may be unclear, including when the victim has previously been afraid to cooperate, the U visa statute authorizes certifiers to sign certifications based on the likelihood of future helpfulness.¹²⁷ Therefore, certifiers, including judges, may certify when the judge believes, based on the facts of the case, that there is a likelihood of future helpfulness for the purposes of certification. The judge can determine, based on the facts of the case and the nature of the qualifying criminal activity perpetrated against the applicant, that there is probable cause to believe if the victim were requested to provide future helpfulness to law enforcement, prosecutors, or other government agencies investigating the criminal activity the victim would cooperate in such future investigation, prosecution, sentencing, or conviction. However, as a practical matter, in any case that has made its way into the court system there will likely be ample evidence from the court records, court appearances, and other information the court receives and observes as part of the court

process of past or present helpfulness of the victim. If there is evidence of past or present helpfulness, that is sufficient for certification and the certifying agencies, including courts, do not need to engage in predicting future helpfulness to certify.

There is no statute of limitations.

The U visa regulations¹²⁸ and the DHS *Resource Guide* broadly define helpfulness to include most types of victim assistance with any one or more of the following: detection, investigation, prosecution, conviction, or sentencing of a criminal activity.¹²⁹ The broad view of helpfulness sufficient for certification and sufficient for issuance of a U visa is rooted in the legislative history and purpose of the U visa. The central purpose of the U visa is to encourage immigrant crime victims to report criminal activity and to cooperate with government officials in the detection, investigation, prosecution, conviction, or sentencing of criminal activity.¹³⁰ The government officials receiving cooperation from the victim may be law enforcement, prosecutors, the courts, or any federal or state government agency with investigative or prosecutorial authority, and the case may be criminal, civil, family, or an administrative action. Providing immigrant victims temporary legal immigration status removes the threats of deportation used by perpetrators to silence immigrant victims,¹³¹ keeping them from filing police reports, cooperating with government agency investigators, cooperating in criminal prosecutions, seeking protection orders, and seeking custody of their children.

*Helpfulness may include past or present helpfulness. DHS explains that:*¹³²

Law enforcement, prosecutors, judges or government officials can certify a U visa based on past, present, or the likelihood of future helpfulness of a victim. A current investigation, the filing of charges, a prosecution or conviction is not required to sign the U visa certification. An instance may occur where the victim has reported criminal activity, but an arrest, prosecution, or conviction cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, when the perpetrator has fled or is otherwise no longer in the

jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials. There is no statute of limitations on signing the certification—one can be signed for a crime that happened many years ago or recently. A certification may also be submitted for a victim in a closed case.

When Congress created the U visa as part of VAWA 2000 the statute included congressional findings about the purpose of the U visa. Section 1513(a)(1) of VAWA 2000 highlighted the fact that

[a]ll 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. The U visa was created to strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes... 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 victims and prosecute crimes committed against aliens.

Congress went on to state that creating the U visa will “facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status.”¹³³

The U visa regulations also discuss the fact that helpfulness in “detection” of criminal activity is sufficient for certification and issuance of the U visa. The U visa regulations define the term “investigation or prosecution...to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer’s investigative duties.”¹³⁴ The preamble to the regulations go on to state: “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.”¹³⁵

Several courts have issued U visa certifications that are consistent with the U visa regulations and DHS publications on the U visa’s helpfulness requirements. These include certification based on past, present or future helpfulness. In *Garcia v. Audubon Communities*,¹³⁶ the plaintiffs were a group

of undocumented workers asking the court to sign a U visa certification that showed that they were helpful in the investigation of a crime. The court did not dispute that a “federal judge is qualified” to certify U visa applications and found that the workers had made “a prima facie showing that they have been a victim of qualifying criminal activity, that they possess[ed] information concerning the qualifying criminal activity, and that they [were] likely to be helpful to an investigation or prosecution.”¹³⁷

Further, the court emphasized that “on-going criminal investigation may not be necessary to certify a U visa application because the regulations contemplate the future helpfulness of the applicant(s).”¹³⁸ *Baiju v. U.S. Dep’t of Labor*, likewise, correctly holds a broad interpretation of “helpful”¹³⁹ and “investigation,”¹⁴⁰ conforming to DHS regulations.¹⁴¹

Some examples of helpful actions include, but are not limited to:¹⁴²

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

Neither a conviction nor a trial is needed for proof of helpfulness. DHS guidelines explicitly state that a certifier may sign a certification even when “the case was dismissed by the prosecutor or a judge.” Helpfulness may be provided at any point during the detection, investigation, prosecution, sentencing, or conviction stages of a qualifying criminal activity. Further, there is no requirement that an arrest, prosecution, or conviction need occur for someone to be eligible for the U visa.¹⁴³

There have been misconceptions in the legal community regarding the scope and application of the helpfulness requirement. The North Carolina Judicial Standards Commission’s Advisory Opinion in 2014 erred in not recognizing that the U visa statute and DHS regulations and policies establish a wider scope of the purpose of the U visa to include reporting of criminal activity in addition

to continued participation in the investigation or prosecution. Helpfulness from the immigrant crime victim may occur at various stages of detection, investigation, prosecution, sentencing, and conviction.¹⁴⁴ The discussion in the North Carolina opinion erroneously treats helpfulness almost exclusively as future helpfulness.¹⁴⁵ The U visa statute, as well as DHS guidelines, explicitly describe past, present, and future helpfulness.¹⁴⁶

Evidence of Helpfulness

A judge may observe evidence of helpfulness in cases that have not, do not, or may not reach the stages of full prosecutions, conviction, or sentencing.¹⁴⁷ Examples of evidence of helpfulness that a judge may witness in a case that does not involve a full prosecution, conviction, or sentencing include the following:

- The victim witness gives strong and helpful information to law enforcement that is documented in a police report, but the charging deputy declines to file charges.
- The victim was cooperative with law enforcement.
- The victim was cooperative or gave evidence at one or more of the following: the initial appearance, bond hearing, hearing on a criminal or civil protection order, preliminary hearing, or arraignment.
- The victim testified in court.
- The judge finds probable cause to sign an arrest warrant based on witness and victim interviews and a police investigation.
- The victim is cooperating with the prosecutor, but the prosecutor believes there will be no conviction because of lack of sufficient corroboration, so the prosecutor declines to prosecute.
- The victim provides evidence to prosecutors or testifies, the case ends in an acquittal or with a hung jury, and the prosecutor decides not to re-file the criminal case.
- The prosecutor initiates a criminal prosecution in which a victim is providing helpful evidence to police and prosecutors, but the

prosecutor discovers irregularities in the crime lab or irregularities with police officers' investigation and either exercises prosecutorial discretion not to file the case or discharges the matter in the interest of justice.

Further, a judge may be the only certifying official the victim will encounter due to a variety of possible circumstances. "Judges are included as certifiers based, in part, on the understanding that language barriers prevent some immigrant victims from successfully communicating with law enforcement officials when trying to report crimes."¹⁴⁸ A judge may be the first certifier to detect underlying qualifying criminal activity through victim testimony, pleadings, emergency orders, or motions from civil proceedings.¹⁴⁹ Due to language barriers, a judge may also be the first certifying official who has language accessibility for the victim and is able to provide assistance.¹⁵⁰ This most commonly occurs when police arriving at the scene of a crime did not secure the assistance of qualified interpreters in the victim's native language, and the victim was unable to communicate with the police who responded to the scene of the crime.

According to DHS, a certifying agency or official may sign a certification regardless of the outcome of the qualifying case and regardless of whether the case was ever prosecuted.¹⁵¹ DHS contemplates various scenarios in which there may not be a pending investigation or prosecution in which a certifying official may still certify. These include the following:¹⁵²

- The prosecutor decided not to prosecute.
- The grand jury did not issue an indictment.
- The case was dismissed by the prosecutor or a judge.
- A case brought by the EEOC or DOL resulted in a judgment, settlement, or dismissal.
- A judge issued a protection order or custody ruling.
- A child abuse case was settled.
- The defendant entered a plea, whether the plea was to an offense that is a qualifying criminal activity or not.
- The defendant was found not guilty.

The purpose behind the U visa is to encourage the reporting of criminal activity, cooperation with law enforcement, and continued participation in the criminal justice.¹⁵³ Fostering this participation was a particularly important goal of the U visa because the key beneficiaries of the U visa, undocumented or out-of-status immigrants, are often wary of law enforcement or may be afraid to report a crime for fear of alerting law enforcement to their immigration status.¹⁵⁴

DHS adjudicates helpfulness in the initial U visa application, evaluating the certification together with a totality of the supporting documentation submitted with the U visa application. Once a U visa is approved, the victim has a continuing obligation to cooperate with police, prosecutors, and other government agencies' reasonable requests for assistance.¹⁵⁵

USCIS will not provide U visas to petitioners who have unreasonably refused to continue cooperating with reasonable requests from law enforcement. In determining whether the victim unreasonably refused to provide assistance, USCIS is required to consider the totality of the circumstances based on all available affirmative evidence in the case including force, fraud, or coercion, the nature of the victimization, 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.¹⁵⁶

Certification and Judicial Ethics

The Minnesota Board of Judicial Standards released Opinion 2015-2 on June 26, 2015, addressing the permissibility of U-visa certification by judges.¹⁵⁷ One of the issues the advisory opinion specifically addressed is the concern that judges are ethically prohibited from "mak[ing] any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing."¹⁵⁸ However, the advisory opinion makes the distinction that a judge may make such statements in the course of official duties and further recognized certification for U visa as falling into the category of a judge's "official duties."¹⁵⁹ The Board also considered whether, by signing a certification, judges are improperly involving

themselves in the role of the prosecution by forecasting whether a witness may be helpful to the prosecution.

The Minnesota Board on Judicial Standards advisory opinion discussed how and under what circumstances judges can sign U visa certifications without violating the canons of judicial ethics and included well researched legal analysis of U visa laws that in large part is consistent with the U visa statute, regulations, and DHS publications on the U visa. The opinion, however, was legally inaccurate in stating in *dicta* that, after the certifying agency has made its certification, “the United States Citizenship and Immigration Services (“USCIS”) will then review the application *de novo*.”¹⁶⁰ This statement is erroneous. The signing of a U visa certification is not an adjudication of an immigration case.¹⁶¹ USCIS is the only body that reviews and adjudicates U visa applications.¹⁶² In fact, the regulations require USCIS to conduct a review of *all* evidence submitted in connection with the U visa application and may investigate any aspect of the petition.¹⁶³ USCIS adjudication is not a *de novo* review of any prior adjudication by the state court.

Although the Minnesota Advisory Opinion is more conforming to the congressional and statutory intent of the U visa certification procedures than the North Carolina Advisory Opinion, there are still some issues with the guidance. The opinion erroneously implies that a judge should only certify during sentencing and conviction, or when the case is otherwise completed.¹⁶⁴ The opinion reaches this conclusion based on a misconstruction of the USCIS regulations. The Advisory Opinion concludes:¹⁶⁵

Certification by a presiding judge in a pending criminal case. *The applicable federal regulations indicate that the appropriate time for judges to determine helpfulness is following conviction, not during the investigation or prosecution of a criminal matter.*

However the full quote from the regulatory history accompanying the U visa regulations states as follows:¹⁶⁶

The rule provides that the term “investigation or prosecution,” used in the statute and throughout the rule, includes the detection or investigation of a qualifying crime or criminal activity, as well as the prosecution, conviction,

or sentencing of the perpetrator of such crime or criminal activity. New 8 CFR 214.14(a)(5). Referring to the AG Guidelines, USCIS is defining the term to include the detection of qualifying criminal activity because the detection of criminal activity is within the scope of a law enforcement officer’s investigative duties. AG Guidelines, at 22–23. Also referring to the AG Guidelines, USCIS is defining the term to include the conviction and sentencing of the perpetrator because these extend from the prosecution. Id. at 26–27. Moreover, such inclusion is necessary to give effect to section 214(p)(1) of the INA, 8 U.S.C. 1184(p)(1), which permits judges to sign certifications on behalf of U nonimmigrant status applications. INA sec. 214(p)(1), 8 U.S.C. 1184(p)(1). Judges neither investigate crimes nor prosecute perpetrators. Therefore, USCIS believes that the term “investigation or prosecution” should be interpreted broadly as in the AG Guideline.

Neither conviction nor prosecution is required for a certifier, including a judge, to sign a certification.¹⁶⁷ In the U visa regulations USCIS stated that “USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the early stages of an investigation.”¹⁶⁸ In the context of U visa certification by judicial officers limiting certification to following conviction is an incorrect interpretation of federal U visa laws and regulations. In addition to signing U visa certifications following conviction or sentencing, which is clearly authorized, judges are authorized to sign U visa certifications based on detection of criminal activity that comes to the court’s attention most often because of the victim’s helpfulness. The court’s ability to detect criminal activities includes, but is not limited to, criminal court cases. Courts detect criminal activities in civil and family court cases, including but not limited to cases in which:

- Victims of domestic violence, child abuse, stalking, or sexual assault came to court seeking civil protection orders;¹⁶⁹
- A parent provides evidence of domestic violence or child abuse in a custody case;¹⁷⁰
- A non-abusive protective parent provides evidence to assist in a child abuse case;¹⁷¹

- The EEOC, the US Department of Labor or a state labor enforcement agency brings a case in which the facts of the case include information about criminal activities occurring in the workplace, for example, sexual assault, extortion or felonious assault.¹⁷²

Relevant U visa evidence and testimony can be found in a family or civil court case regarding the victim's communication with law enforcement officials or prosecutors (e.g., 9-1-1 tapes, police reports, interviews with investigators, meetings with prosecutors, or the victim received crime victim's compensation).

In criminal cases evidence of a victim's helpfulness at earlier stages of the criminal case prior to conviction or sentencing that commonly serve as a basis for judges detecting helpfulness include but are not limited to information in the court record, including pretrial motions, regarding the victim:

- Calling the police for help,
- Making a police report,
- Speaking with investigators,
- Appearing in court at arraignments,
- Serving on a grand jury,
- Attending motions hearings,
- Receiving a criminal no-contact, stay-away or protection order,
- Reporting incidents of witness tampering or obstruction of justice to prosecutors that become part of prosecutor's motions to the court, or
- Appearing at court on dates set for the criminal case.

When the court observes the victim's involvement in a civil, family, or criminal case that is based upon criminal activity (e.g., a criminal prosecution, an EEOC employment case, a civil protection order, or a child abuse case) or in which the victim reveals to the court in testimony, motions, or through other evidence information about criminal activity they suffered (e.g., evidence of domestic violence in a custody or divorce case) the court can base its

certification upon detection of criminal activity and can sign U visa certifications without regard to whether the case involves or proceeds through criminal conviction or sentencing. The DHS confirms in its *Resource Guide* on U visa certifications that:¹⁷³

There is no statutory or regulatory requirement that an arrest, prosecution, or conviction occur for someone to be eligible to apply for a U visa. Instances may occur where the perpetrator has fled the jurisdiction, left the United States, or been arrested for unrelated offenses by another agency in another jurisdiction. An arrest, prosecution, or conviction may not be possible in these situations. The petitioner will still have to meet the helpfulness requirement ... and will also have to meet all other eligibility requirements in order to qualify for a U visa.

The Minnesota Board of Judicial Standards confirmed the following about the Judicial Ethics Code:

- With regard to a case in which the prosecution has been completed, the fact that the case is closed or completed "does not prohibit the presiding judge from signing an I-918B form certifying that a U-visa petitioner was helpful."¹⁷⁴
- Whether a judge should sign a certification in an ongoing civil or criminal case is a matter of law and does not implicate the judicial ethics code.¹⁷⁵
- For a judge to sign a certification the judge must have an adequate basis for the averments made in the certification.¹⁷⁶
- In finding that signing U visa certifications does not abuse the prestige of a judicial office the board found: "Federal courts have recognized certifications by judges as authorized. Abuse is not involved when the law and the courts countenance judicial certifications."¹⁷⁷

Recommended best practices for judicial certification that promote certification by judges in U visa cases and are simultaneously consistent with judicial ethics¹⁷⁸ include:

- **Completed cases:** Once the criminal or civil case is completed judicial officers can sign

certifications based on the courts orders and findings issued, upon the court's observations of helpfulness, or upon the court record in the case. The case may be completed in a wide number of ways, including but not limited to: following a full trial in which the court issued an order, based on a court order issued by consent of the parties when the case before the court settled, when the prosecution dropped the case or asked that the court dismiss the case, or when the perpetrator was found not guilty. In closed cases signing a certification by a judge is an administrative function that is one of a judge's "official duties."¹⁷⁹ Because there is no open case before the court and judicial certification is based on the court records, evidence in the case before the court, hearings held on the record before the court, and also potentially the judicial officer's observations regarding the victims' helpfulness during the civil or criminal case, certifications can be requested and issued without providing notice to parties in the case.

- **Open and pending civil and criminal cases:** When a party seeks certification in an open criminal or civil case, for the court to ethically consider the certification request the court should provide parties in the case with notice and opportunity to be heard on the certification request.¹⁸⁰ By disclosing the request to the parties and hearing arguments regarding the certification, the court handles these requests to certify in a manner similar to other motions that come before it. In this way the court can rule on the certification request while maintaining the court's independence, integrity, and impartiality. Signing U visa certifications in an open case is similar to making probable cause determinations in the early stages of a pending criminal case.¹⁸¹

Judicial Officers Can Certify

Most existing case law has correctly held that judges are qualified to make U visa certifications.¹⁸² However, there are courts that have incorrectly interpreted the U visa regulations issued by USCIS as not allowing judges to certify. In *Agaton v. Hospitality and Catering Servs., Inc.*, the court denied a request for certification questioning DHS regulations and prior interpretations and concluding

that a judge cannot certify when the judge had no responsibility in any pending investigation or prosecution of the qualifying crime.¹⁸³ The court disagreed with prior interpretations in other cases¹⁸⁴ and concluded that a broad read of the regulations to allow certification by a judge when a judge has no connection to the prosecution or investigation involving victims would do violence to the rest of the regulatory language.¹⁸⁵ The court declined to suggest the circumstances under which it would be appropriate for a judge to sign a certification.¹⁸⁶ In other court cases, while still holding that judges may certify under the statute, courts have imposed limitations on the interpretation of under what circumstances a judge may certify that do not exist in and do not comport with the intended scope of the statute and DHS regulations.¹⁸⁷ Further, some courts have gone so far as to question the permissibility of judicial certification¹⁸⁸ or even rule it as impermissible.¹⁸⁹

In each of these cases the courts failed to consider the *Chevron* requirements that DHS's interpretations in the U visa regulations, based on notice-and-comment rulemaking, be afforded deference. In fact, no mention was made in any of these cases of the Supreme Court cases governing when courts are required to defer to a federal agency's interpretation of a federal statute.¹⁹⁰

Although, the Minnesota Board of Judicial Standard's Advisory Opinion is in large part consistent with U visa regulations and statutes, it contains some analysis that misinterprets U visa regulations regarding judicial certification. The opinion relies on case law from cases that failed to follow *Chevron* requirements and reached conclusions that are legally incorrect and in conflict with the statute, regulations, and DHS policies on U visa certification.¹⁹¹ As a result the Minnesota opinion recommends that judges only certify after conviction or sentencing.¹⁹² Such limitations set out in the opinion are contrary to the intended scope of the U visa regulations.

There have been notable cases that have correctly ruled that judicial certification is permissible when the petitioner meets the certification requirements. In *Garcia v. Audubon Cmtyes. Mgmt. LLC*, the court unequivocally stated that the qualification of federal judges to certify is indisputable.¹⁹³ Further, in *Villegas v. Metro. Gov't of Nashville*, the court accepted the petitioners' *prima facie* showing that they were victims of a qualifying criminal activity and further recognized that judges are qualified to certify.¹⁹⁴

DHS regulations contemplate that there are circumstances in which an investigation or prosecution that makes the victim eligible for a U visa may never reach the prosecution stage or may not result in a successful conviction.¹⁹⁵ Even in such instances, U visa certification is still appropriate if the individual seeking the U visa was a victim of a qualifying crime and if the individual was, is being, or is likely to be helpful in the investigation or prosecution.¹⁹⁶ Further, DHS policies confirm that a certification may occur at any stage of the case, from the point of detection, during the investigation, at the initiation of prosecution, pre-trial, whether the victim is testifying, and at the conclusion of the case.¹⁹⁷

Government agencies that have criminal, civil, or administrative investigative or prosecutorial authority are authorized to sign U visa certifications.¹⁹⁸ Personnel authorized by the U visa statute or the U visa regulations to sign certifications include¹⁹⁹ a federal, state, local, tribal, and territorial law enforcement agency, including a state police department, a sheriff, the Federal Bureau of Investigation, and the Bureau of Alcohol, Tobacco, Firearms and Explosives; federal, military, or state prosecutors, district attorneys, and attorneys general; the Department of Homeland Security,²⁰⁰ judges,²⁰¹ including any government official with delegated authority from a federal, state local, tribal, or territorial court to decide cases, including but not limited to administrative law judges, commissioners, magistrates, alderman, judicial referees, surrogates, masters, and chancellors.²⁰² Other authorized certifiers include child or adult protective services, the Equal Employment Opportunity Commission, and the Department of Labor.

Judges, commissioners, magistrates, and other officials with delegated authority from a federal, state, local, tribal, or territorial court are specifically authorized by statute to sign U visa certifications.²⁰³ Certification by courts is based on the victim's role in the detection, conviction, or sentencing of the criminal activity.²⁰⁴ When a crime victim reveals facts of the criminal activity in a civil or family court case including for example, a civil protection order,²⁰⁵ custody,²⁰⁶ or employment discrimination case, the victim is assisting the court in detecting criminal activity.

Judicial certification may also be based on the court's observations of actions the victim took and evidence presented in a criminal, employment, protection order, or custody case that provides the court information about the victim's helpfulness to police, prosecutors, or other government officials²⁰⁷

in the detection, investigation, or prosecution of the criminal activities perpetrated against the victim.²⁰⁸ A judge can observe that a victim cooperated in the prosecution by the role the victim played in the case.

Certification Is Not an Endorsement of Character

Another issue posing a concern for some judicial certifiers is the distinction between certifying helpfulness and endorsing the character of the petitioner. The DHS *Resource Guide* states that "by signing a U visa certification, the...judge is not sponsoring or endorsing the victim for a U visa, and the completed certification does not guarantee that USCIS will approve the petition."²⁰⁹

The Minnesota Board of Judicial Conduct addressed these concerns of judges in their ethics advisory opinion by stating, "In the Board's opinion, a certification does not vouch for an alien's character. Instead, the certification pertains to the alien's helpfulness...A helpful alien may or may not have good character."²¹⁰

The DHS *Resource Guide* adds that:²¹¹

A certifying ... agency/official cannot be held liable for the future actions of a victim for whom the agency signed a certification or to whom DHS granted a U visa. The U visa certification simply states that the person was a victim of a qualifying crime, possessed information relating to the crime, and was helpful in the investigation or prosecution of that crime. The certification does not guarantee the future conduct of the victim or grant a U visa.

The North Carolina Judicial Standards Commission's Advisory Opinion, however, misinterprets the nature of certification, characterizing it as voluntary character testimony.²¹² This opinion ignores the fact that judges routinely make credibility determinations and issue findings of fact in the course of their judicial duties. In carrying out these core judicial roles judges are clearly acting to fulfill their legal obligations and this decision-making is not characterized as character testimony as to any individual or party.²¹³

Signing a U visa certification provides evidence²¹⁴ to USCIS. It is the role of USCIS to determine the quality of the totality of the evidence of helpfulness and whether the quantity of evidence that the victim has presented is sufficient to meet the victim's burden of

proof for the U visa petition.²¹⁵ In signing the certification the court is not adjudicating the U visa case, which is the role solely reserved for USCIS.²¹⁶ As a result, the U visa certification is not a personal recommendation, rather it is simply a certifying statement providing evidence that: (1) a qualifying criminal activity has occurred; (2) the victim has information about the criminal activity; and (3) an act (or acts) of helpfulness have occurred or the immigrant victim is likely to be helpful in the future.²¹⁷

A certifying agency should not make character considerations when making the decision to sign a U visa certification. USCIS makes any character determinations necessary to the adjudication of the U visa petition. A victim with a criminal history is not automatically precluded from approval for a U visa.²¹⁸ USCIS is solely responsible for considering a victim's criminal history on a case-by-case basis as part of the U visa adjudication and may take into account whether the criminal behavior was related to the victimization.²¹⁹ DHS encourages certifiers to include in the certification or as an attachment to the certification any information about the victim's prior criminal history that the certifier wants to bring to the attention of USCIS officials adjudicating the U visa application.²²⁰

As part of its adjudication USCIS will conduct a thorough background and security check and will review all available information concerning arrests, immigration violations, and security issues.²²¹ It is not the role of the certifier to conduct background checks or to withhold certification based on any uncertainty regarding an applicant's background or character.²²² USCIS may or may not deny a U visa application based on the victim's criminal history and will review all available information regarding the victim's background.²²³

Certification in Civil Cases

There are a number of court cases, which have incorrectly held that certification cannot be made in a civil case or when a criminal case has not been opened.²²⁴ This is another example of court rulings that do not comport with DHS' implementation of the U visa statutes.²²⁵

Federal and state court judges can sign certifications based on the victim's involvement in a civil or criminal court case.²²⁶ Administrative law judges can sign certifications based on the involvement of an immigrant crime victim who reveals criminal activity perpetrated against the victim as part of an administrative law matter.²²⁷ Judges

may certify at any time after detecting a qualifying U visa offense. Judges most commonly issue certifications as an administrative matter in a civil or criminal court case that has been concluded. However judges can upon motion, service, and consideration of any opposition to the motion, issue certifications in an ongoing civil or criminal case. In a criminal case, with notice to the prosecution and the defense, judges can issue certification after they have observed the victim's helpfulness in the criminal case, which may be after arraignment, during a probable cause hearing (grand jury or preliminary hearing), or while the criminal case is still pending. The most common scenario is for judicial certifications to be requested once the criminal case has been completed or following the judge's issuance of a ruling in a civil or criminal court case.

There are also a wide range of civil court actions that could involve criminal activities. For example:

- Domestic violence, sexual assault or stalking protection order cases;²²⁸
- Custody cases in which criminal activity has been perpetrated against a parent or child;²²⁹
- A family or juvenile court case involving child abuse or neglect;²³⁰
- A family court case involving elder abuse or abuse of a dependent adult;²³¹
- A civil court case involving a victim of dating violence or stalking; or²³²
- An employment discrimination or labor law violation case in which the harms workers suffered included being subjected to U visa listed criminal activities.²³³

A judge may observe evidence of helpfulness in civil court cases for the purposes of U visa certification, regardless of whether a criminal case is ever opened against the perpetrator of the underlying criminal activity or not. For example, a victim of sexual assault, human trafficking, or extortion in the workplace offers helpfulness when they cooperate with the EEOC or Department of Labor in the investigation of the employer. That case may or may not also include evidence that the victim made a police report regarding the criminal activities suffered. The police report is evidence of another form of helpfulness.

Civil protection orders were designed as an alternative to criminal proceedings in cases of domestic violence.²³⁴ Many of the U visa qualifying criminal activities would also serve as a statutory basis under state law for issuance of a protection order.²³⁵ Seeking and obtaining a protection order from a court constitutes sufficient helpfulness for U visa certification.²³⁶ In addition, when a victim of domestic violence, dating violence, or stalking seeks a civil protection order, the victim is assisting local law enforcement officers involved in serving protection orders in detection of the criminal activity. The act of obtaining a protection order provides helpfulness to police and prosecutors because the perpetrator can be criminally prosecuted for future abuse occurring after the protection order is issued.

In *Matter of Rosales*, the court correctly determined in a protection order proceeding that it had the authority to sign a U visa certification.²³⁷ The court demonstrates how a court in a protection order case, is able to glean the criminal acts for which the individual sought the protection order from the original family offense petition.²³⁸ DHS has confirmed that certification may also be appropriate in custody cases in which domestic violence, rape, incest, or any of the qualifying criminal activities listed in the U visa statute are presented as evidence in the family court custody case.²³⁹

Certification by a Non-Presiding Judge

Another misconception about judicial certification is that a judge may only certify if the judge presided over the victim's case.²⁴⁰ U visa certification can be provided by any judicial officer with delegated authority from a federal, state, local, tribal, or territorial court.²⁴¹ The judge in *Matter of Rosales*, issuing the U visa certification was not the judge who presided over the victim's protection order case. The judge who issued the protection order had retired. The certifying judge reviewed the hearing transcripts, the court's file, and the family offense petition to determine whether the applicant was eligible for certification.²⁴² Despite the fact that neither the transcript nor the court's file indicated the criminal activity that resulted in the issuance of the final protective order, the certifying judge was able to refer to the enumerated acts in the family offense petition to complete the certification.²⁴³ *Matter of Rosales* provides an excellent example of how a court that did not hear the original case can

obtain adequate basis for the averments made in the certification.

Judges may sign a certification whether a case has been adjudicated before the specific judge signing the certification or not. Under U visa certification regulations, any state, local, or federal judge with knowledge about the criminal activity the victim suffered and the helpfulness of the victim potentially has an adequate factual basis to certify.²⁴⁴ USCIS accepts certifications signed by judges who were not assigned to the case when the judge signing the certification has knowledge of the case from reviewing the record or consulting with the judge who heard the case.²⁴⁵

There is no statute of limitations regarding how long after the court has been involved in a case that a U visa certification can be requested and signed.²⁴⁶ As a result, it is not uncommon for victims to seek certification from a court at a time when the judicial officer or officers who heard or decided the victim's civil or criminal case is no longer available to certify. Common examples of circumstances in which a judge other than the presiding judge would be needed to sign a certification include the following situations:

- When the presiding judge rotates to a new calendar, switches dockets, or is one of the judges assigned to ride a circuit in a rural jurisdiction;
- When the judge who presided over the case has retired, died, is incapacitated, was not re-elected, is on extended vacation, sick leave or other administrative leave, or has moved away from the jurisdiction or left the country; or
- When the court assigned all of the U visa certifications to a particular judge who signs certifications for that jurisdiction.

Many court records will contain sufficient information about the criminal activity, the identity of the victim, and the victim's helpfulness for a judicial officer to sign a certification in a case that was not originally before the judicial officer being asked to sign the certification. The needed information could come from court orders, judicial findings, recordings of court hearings, pleadings, settlement agreements, notes in the court record made by the judge who presided over the case, and evidence submitted that is part of the court record. The evidence submitted to

the court could include police reports, photographs, medical records, exhibits introduced into evidence, the prior judge's case notes, transcripts and recordings of hearings, witness testimony, and the court's on-the-record rulings.

The U visa is one of two areas of federal immigration law in which the Congress created a specified role for judges as U visa certifiers.²⁴⁷ The other federal immigration statute in which Congress required involvement of state court judges was in issuing state court findings that are a prerequisite to an immigrant child's ability to file for Special Immigrant Juvenile Status when the child has been abused, abandoned, or neglected by one of the child's parents.²⁴⁸

This article has examined the difficulties courts have had as they struggle with U visa certification in cases that address issues of first impression. When federal immigration laws and state and federal laws governing courts, law enforcement, prosecution, labor rights, domestic violence, sexual assault, and human trafficking intersect create ambiguity, such ambiguities can only be addressed by implementing regulations and policies issued by DHS.

In the emerging case law regarding U visas, many issues are raised and few are settled as jurisdictions struggle with issues of first impression. Outcomes across jurisdictions have differed and certainly jurisdictions will continue to diverge on many issues. Although an article of this scope, at this time, cannot resolve the many issues that arise in the different jurisdictions that have addressed U visas, a systematic review of the available decisions regarding U visas is useful and important to highlight some of the key strategic decisions and caveats for litigants and parties in these cases. The U visa is a powerful tool granted by Congress to the criminal justice system. When used correctly, it aids the system in bringing perpetrators to justice and protects crime victims and witnesses.

NOTES

1. Although commonly referred to as the U visa, a visa is a document that permits the holder to request permission to enter the United States at a port of entry. However, what is referred to as a "U visa" is actually a form of immigration status most often granted to people already within the territory of the United States pursuant to 8 U.S.C. §1101(a)(15)(U). The Department of Homeland Security (DHS) regulations refer to the "U visa" as "U nonimmigrant status." See generally, "New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status: Interim Rule," 72 *Fed. Reg.* 53013 (Sept. 17, 2007). This article adopts the colloquial use and refers to this status with the common term "U visa."
2. Violence Against Women Act of 2000, §1513 of the Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 1512, 1513, Pub. L. No. 106-386, 114 Stat. 1464 (2000).
3. Ann Moline, "Bi-Partisan Women Made Anti-Violence Act Happen," *Women's Enews*, Dec, 19 2000, available at <http://womensenews.org/2000/12/bipartisan-women-made-anti-violence-act-happen/>, last accessed Oct. 28, 2017.
4. Violence Against Women and Justice Department Reauthorization Act of 2005, H.R. 3402, 109th Cong. §§ 104, 801, 813, 814, 821, 825, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).
5. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. §§101, 102, 801, 802, 804, 805, 809, 810, 1222, 1231, 1263, Pub. L. No. 113-4, 127 Stat. 54 (March 7, 2013).
6. The term "judge" used in this article includes, "Any official with delegated authority from a federal, state, local, tribal or territorial court to decide cases including but not limited to: administrative law judges, commissioners, magistrates, aldermen, judicial referees, surrogates, masters, and chancellors. "Dep't of Homeland Sec., *U and T Visa Law Enforcement Resource Guide*, 16 (2015), available at <http://library.niwap.org/wp-content/uploads/DHS-U-and-T-Visa-Law-Enforcement-Resource-Guide-11.30.15.pdf>, last accessed Oct. 28, 2017 (hereinafter *DHS, Resource Guide*).
7. Qualifying criminal activities covered by the U visa statute INA §101 (a)(15)(U)(iii) are: abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, felonious assault, female genital mutilation, fraud in foreign labor contracting, being held hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation, slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and related criminal activities or attempt, conspiracy, or solicitation to commit any of the previously mentioned crimes. Dep't of Homeland Sec. (DHS), *Resource Guide*, *supra* n. 6, at 7.
8. See generally, Minnesota Board of Judicial Standards, *U Visa Certification by Judges: Minnesota Board of Judicial Standards*

Opinion 2015-2 (2015) available at <http://niwaplibrary.wcl.american.edu/pubs/min-board-judicial-standards-opinion-2015-2-final/>, last accessed Oct. 28, 2017; Alan F. Pendelton, "Immigrant Crime Victims and U visa Certification—What is it and Why Should Judges Care? (National)" (2015) available at <http://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>, last accessed Oct. 28, 2017.

9. See generally Katrina Castillo, Alexandra Spratt, Catherine Longville & Leslye E. Orloff, *Legislative History of VAWA (94, 00, 05), T and U Visas, Battered Spouse Waiver, and VAWA Confidentiality*, Nat'l Immigr. Women's Advoc. Project (June 17, 2015), available at http://niwaplibrary.wcl.american.edu/pubs/vawa_leg-history_final-6-17-15-sji/ and Leslye E. Orloff & Janice V. Kaguyutan, "Offering a Helping Hand: Legal Protection for Battered Immigrant," 10 *Am. U. J. Gender Soc. Pol'y & L.* 95 (2002).

10. 145 *Cong. Rec.* S444 (daily ed. Jan. 19, 1999) (statement of Sen. Biden).

11. 146 *Cong. Rec.* S10219-20 (2000).

12. 146 *Cong. Rec.* S126 (Oct. 11, 2000) (statement of Sen. Biden).

13. VAWA 2000 § 1513(a) (emphasis added).

14. DHS, *Resource Guide*, *supra* n.6 at 4.

15. *Id.*

16. DHS, *Resource Guide*, *supra* n.6, at 5; See also Krisztina E. Szabo & Leslye E. Orloff, "The Central Role of Victim Advocacy for Victim Safety While Victims' Immigration Cases Are Pending," 2-3 (June 18, 2014), <http://library.niwap.org/wp-content/uploads/2015/IMM-Qref-SafetyPlanning-06.18.14.pdf>, last accessed Oct. 28, 2017 (Willingness to participate in the justice system including seeking protection orders (43.7 percent U visa, 47.6 percent VAWA), making police reports for future crimes (50.3 percent U visa, 36.2 percent VAWA), and participation in criminal investigations and prosecutions (73.1 percent U visa, 33.4 percent VAWA) increases significantly among immigrant victims who have filed VAWA self-petitions and U visas).

17. Castillo, *et al.*, *supra* n.9; National Immigrant Women's Advocacy Project, *Report: The Importance of the U Visa as a Crime Fighting Tool for Law Enforcement Officials – Views from Around the Country* (Dec. 3, 2012) available at <http://niwaplibrary.wcl.american.edu/pubs/uvisa-crime-fighting-tool/>, last accessed Oct. 28, 2017; Department of Homeland Security, Blue Campaign, Roll Call Videos

for Law Enforcement on U Visa Certification and T Visa Endorsement (Sept. 26, 2013) available at <http://niwaplibrary.wcl.american.edu/2014/04/dhs-roll-call-videos/>, last accessed Oct. 28, 2017 (Holding perpetrators of domestic violence accountable also improves officer safety).

18. Krisztina E. Szabo, David Stauffer, Benish Anver, & Leslye E. Orloff, "Early Access to Work Authorization for VAWA Self-Petitioners and U Visa Applicants," 28-31 (Feb. 12, 2014) available at http://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/, last accessed Oct. 28, 2017 (Describing how immigrant victim's use of the criminal and civil justice systems increased after the victim has filed a U visa application or VAWA self-petition and after the victim received legal work authorization as a part of the immigration application process) See also, Leslye Orloff, Levi Wolberg & Benish Anver, "U-Visa Victims and Lawful Permanent Residency," Nat'l Immigr. Women's Advoc. Project (Sept. 6, 2012), available at <http://niwaplibrary.wcl.american.edu/pubs/pb-tkit-uvisalawfulpermanentresidency-9-6-12/>, last accessed Oct. 28, 2017. (70 percent of U visa victims, after receiving certification continue to provide ongoing helpfulness in the criminal investigations and prosecutions. Another 29.45 percent of U visa cases are willing to continue cooperating but have been involved in cases in which law enforcement and prosecution officials have not requested additional helpfulness from the victim.) Ongoing cooperation may not be requested for a number of reasons. Generally the reasons may include the following: There may be an unserved warrant for the perpetrator's arrest, the perpetrator may not have been identified, prosecutors may have decided that they do not have sufficient evidence to prosecute, or law enforcement officials are no longer pursuing the criminal investigation.

19. DHS, *Resource Guide*, *supra* n.6, at 4.

20. *Id.*

21. Leslye E. Orloff & Paige E. Feldman, "National Survey on Types Of Criminal Activities Experienced By U-Visa Recipients," Nat'l Immigr. Women's Advoc. Project (Nov. 29, 2011) (45.9 percent domestic violence and 30.4 percent rape, sexual assault, incest, traffick-ing), available at <http://niwaplibrary.wcl.american.edu/pubs/u-visa-criminal-activities-survey/>, last accessed Oct. 28, 2017.

22. DHS, *Resource Guide*, *supra* n.6, at 4.

23. 72 *Fed. Reg.* 53013, *supra* n.1.

24. *Id.*
25. Removal is the term used in immigration law statutes for deportation.
26. 72 *Fed. Reg.* 53013, *supra* n.1.
27. DHS, *Resource Guide*, *supra* n.6, at 20.
28. VAWA 2000 § 1502(a)(3), § 1512(a)(2)(B), 114 Stat. 1464–1548.
29. “Instructions for Petition for U Nonimmigrant Status and Supplement A, Petition for Qualifying Family Member of U-1 Recipient,” 2 (March 2017), available at <http://niwaplibrary.wcl.american.edu/pubs/i-918-instructions>, last accessed Oct. 28, 2017.
30. Alina Husain & Leslye E. Orloff, “VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy” 9, 20 (March 11, 2017) available at <http://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>, last accessed Oct. 28, 2017; DHS, “Implementation of Section 1367 Information Provisions” at p. 14, available at <http://niwaplibrary.wcl.american.edu/pubs/implementation-of-section-1367-all-dhs-instruction-002-02-001/>, last accessed Oct. 28, 2017; DHS, “Broadcast Message on New 384 Class of Admission Code,” available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-broadcast-class-admission-code/>, last accessed Oct. 28, 2017; *See also*, Leslye E. Orloff, “VAWA Confidentiality Protections for Immigrant Crime Victims,” Nat’l Immigr. Women’s Advoc. Project (March 3, 2017), available at <http://niwaplibrary.wcl.american.edu/vawa-confidentiality-materials-tools/>, last accessed Oct. 28, 2017.
31. DHS, *Resource Guide*, *supra* n.6, at 3.
32. *Id.*
33. *Id.*
34. Congress included detection among the activities they wanted to encourage in the U visa legislative history. VAWA 2000 § 1513(a)(2)(A) (“The purpose of this section is to create a new nonimmigrant visa classification that will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”); *See also*, DHS, *Resource Guide*, *supra* n.6, at 4.
35. DHS, *Resource Guide*, *supra* n.6, at 19, 21.
36. *Formal Advisory Opinion: 2014-03* (N.C. Jud. Standards Comm’n Aug. 8, 2014). This opinion has significant limitations as authority because it is based upon the North Carolina Code of Judicial Conduct, as adopted in January 2006. This version of the Code antedates substantial amendments to the ABA Model Code of Judicial Conduct (2006). The differences between the North Carolina Code of Judicial Conduct (2006) and the ABA Model Code of Judicial Conduct (January 2006) are significant in several substantive areas that relate to the permissibility of certifications. *See generally*, Minnesota Board of Judicial Standards, *supra* n. 8
37. *See* 8 C.F.R. § 214.14(a)(5) (“Investigation 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.”).
38. VAWA 2000, § 1513(a)(2)(A).
39. DHS, *Resource Guide*, *supra* n.6, at 4.
40. *Formal Advisory Opinion*, *supra* n.36.
41. DHS, *Resource Guide*, *supra* n.6, at 4.
42. *See* Immigration and Nationality Act (INA) § 245(m); 8 U.S.C. § 1255(m); 8 C.F.R. 245.24 (To apply for lawful permanent residence U visa holders must be physically present in the United States for three years in U visa status; must demonstrate that their continued presence in the U.S. is justified on humanitarian grounds, to ensure family unity, or is otherwise in the public interest; and that they provided cooperation to government officials regarding the criminal activity or did not unreasonably refuse to comply with reasonable requests for assistance. The criminal history of any U visa applicant applying for lawful permanent residency will be reviewed and USCIS will also review mitigating factors in deciding whether to exercise its discretion to grant lawful permanent residency to a U visa holder with a criminal history.)
43. Battered Immigrant Women Protection Act of 2000, § 1513(a)(2)(A), 114 Stat. at 1533–34.
44. INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U).
45. 8 C.F.R. 214.14(c)(iii).

46. 8 C.F.R. 214.14(c)(iii).
47. 8 C.F.R. § 214.14(2)(iv) (If the petitioner is inadmissible, Form I-192, "Application for Advance Permission to Enter as Non-Immigrant," in accordance with 8 C.F.R. 212.17). The U visa provides for generous waivers of inadmissibility provisions. See INA § 245(m); 8 U.S.C. § 1255(m).
48. See INA § 245(m); 8 U.S.C. § 1255(m); 72 *Fed. Reg.* 53013, *supra* n.1.
49. See INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).
50. 8 CFR § 214.14(2)(i). Form I-918, Supplement B, "U Nonimmigrant Status Certification," signed by a certifying official within the six months immediately preceding the filing of Form I-918. Certifying agency means "a Federal, State, or local law enforcement agency, prosecutor, judge, or other authority, that has responsibility for the investigation or prosecution of a qualifying crime or criminal activity. This definition includes agencies that have criminal investigative jurisdiction in their respective areas of expertise, including, but not limited to, child protective services, the Equal Employment Opportunity Commission, and the Department of Labor." 8 CFR § 214.14 (a)(2). Since issuance of the original regulation DHS has clarified that certifications may be signed by any state or federal government agency that has criminal, civil, or administrative investigative or prosecutorial authority. DHS, *Resource Guide*, *supra* n.6, at 6, 11.
51. *Id.*, at 18.
52. See 8 C.F.R. § 214.14(a)(5) ("Investigation 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."); VAWA 2000 § 1513(a)(2)(A).
53. 72 *Fed. Reg.* 53013, *supra* n.1, at 53020. See also 8 C.F.R. § 214.14(a)(5).
54. DHS, *Resource Guide*, *supra* n.6, at 18.
55. DHS, *Resource Guide*, *supra* n.6, at 19.
56. "Information for Law Enforcement Officials: Immigration Relief for Victims of Human Trafficking and Other Crimes," DHS Blue Campaign (January 2017), available at <http://niwaplibrary.wcl.american.edu/pubs/bc-infosheet-law-enforcement-english/>, last accessed Oct. 28, 2017.
57. 72 *Fed. Reg.* 53013, *supra* n.1.
58. 8 CFR § 214.14(2)(i). See also, Form I-918 Instructions (Feb. 7, 2017) ("Supplement B. You must submit an original, properly and timely executed Supplement B certification with your Form I-918.").
59. Information for Law Enforcement Officials, *supra* n.56.
60. DHS, *Resource Guide*, *supra* n.6, at 6 (emphasis added).
61. 8 CFR § 214.14(c)(1). See also, DHS, *Resource Guide*, *supra* n.6, at 8.
62. DHS, *Resource Guide*, *supra* n.6, at 16.
63. *Id.*, at 16.
64. *Arizona v. United States*, 567 U.S. 387 (2012).
65. *Id.*
66. Information for Law Enforcement Officials, *supra* n.56; DHS, *Resource Guide*, *supra* n.6, at 17.
67. *Id.*, at 6.
68. *Id.*, at 17.
69. Information for Law Enforcement Officials, *supra* n.56; DHS, *Resource Guide*, *supra* n.6, at 17.
70. U Visa Certifications, *Proposed Advisory Opinion 2015-2*, (Minn. Board on Jud. Standards May 21, 2015), available at <http://www.bjs.state.mn.us/file/advisory-opinions/proposed-opinion-2015-2--may-21-2015.pdf>, last accessed Oct. 28, 2017.
71. DHS, *Resource Guide*, *supra* n.6, at 21.
72. U.S. Citizenship and Immigration Services (USCIS), DHS, *Report on the Operations of the Violence Against Women Act Unit at the USCIS Vermont Service Center*, Report to Congress, p. 3 (Oct. 22, 2010), available at <http://niwaplibrary.wcl.american.edu/pubs/report-vawa-uscis-vermont-service-center/>, last accessed Oct. 28, 2017 (Consolidation of VAWA petition adjudications in the Vermont Service Center was intended, among other things, to prevent fraud by assigning adjudications to a

unit of specialists in domestic violence cases who could efficiently discern fraudulent petitions, fairly adjudicate legitimate petitions, and protect victims from accidental violations of confidentiality. A single unit was intended to provide consistency and uniformity in the handling of VAWA petitions.); William A Kandel, *Immigration Provisions of the Violence Against Women Act (VAWA)*, Congressional Research Service, (May 15, 2012) p 8 fn. 45 <http://niwaplibrary.wcl.american.edu/pubs/r42477/>, last accessed Oct. 28, 2017 (Congressional Research Service investigation into allegations that of fraud in the VAWA and U visa programs concluded that: “While some suggest that VAWA provides opportunities for dishonest and enterprising immigrants to circumvent U.S. immigration laws, reliable empirical support for these assertions is limited.”)

73. Pub. L. No. 103-322, 108 Stat. 1902.

74. Illegal Immigration Reform and Immigrant Responsibility Act of 1996. (IIRAIRA) PL No. 104-208. Legal Services Appropriations §502, IIRAIRA §§ 301, 304, 384, 501, 531, 552, and 652 (1996).

75. The Victims of Trafficking and Violence Protection Act of 2000, H.R. 3244, 106th Cong. § 1512, 1513, Pub. L. No. 106-386, 114 Stat. 1464 (2000)(The Violence Against Women Act of 2000 was passed as a section of the Victims of Trafficking and Violence Protection Act of 2000).

76. Violence Against Women and Justice Department Reauthorization Act of 2005, H.R. 3402, 109th Cong. §§ 104, 801, 813, 814, 821, 825, Pub. L. No. 109-162, 119 Stat. 2960 (Jan. 5, 2006).

77. Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. §§101, 102, 801, 802, 804, 805, 809, 810, 1222, 1231, 1263, Pub. L. No. 113-4, 127 Stat. 54 (March 7, 2013).

78. *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council*, 467 U.S. 837, 842–43 (1984).

79. See INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

80. The U visa regulations and T and U visa adjustment of status to lawful permanent residence regulations both include in the regulatory history preamble to the regulations extensive and detailed explanations of the reasoning behind each of the provisions contained in the regulations. These preambles provide detailed information for applicants, USCIS adjudicators, and the courts on

the purpose and intent of the regulations. See, 72 Fed. Reg. 53013, *supra* n.1; and T and U Adjustment Regulation, Preamble, at “Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status,” 73 Fed. Reg. 75540 available at <http://niwaplibrary.wcl.american.edu/pubs/federal-register-status-adjustment/>, last accessed Oct. 28, 2017.

81. *Chevron*, *supra* n.78 at 844.

82. *Id.*, at 842–43.

83. *Id.*

84. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (citing *Chevron*, *supra* n.78 at 844).

85. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

86. *Skidmore v. Swift & Co.*, 323 U.S. 134 at 139–40.

87. 72 Fed. Reg. 53013, *supra* n.1.

88. See 73 Fed. Reg. 75540, *supra* n.80.

89. USCIS Notice for Agency Collection Activities: Petition for U Nonimmigrant Status, Form I-918, and Supplements A and B of Form I-918, 81 Fed. Reg. 01763, (January 29, 2016); See also, Agency Information Collection Activities: Petition for U Nonimmigrant Status, Form I-918, and Supplements A and B Form I-918, Extension of a Currently Approved Information Collection; Comment Request, 77 Fed. Reg. 43607 (July 25, 2012).

90. USCIS, Form I-918, Petition for U Nonimmigrant Status, available at <https://www.uscis.gov/i-918>, last accessed Oct. 28, 2017 (April 14, 2017) (New I-918 Form and New I-918 Certification Form and instructions for both forms were issued Feb. 7, 2017. They will replace all prior forms and be the only forms accepted by USCIS beginning on Oct. 2, 2017).

91. The U visa legislative history is collected in: Castillo, *et al.*, *supra* n.9. See 72 Fed. Reg. 53013, *supra* n.1; See 73 Fed. Reg. 75540, *supra* n.80.

92. *Arizona*, *supra* n. 64 at 387.

93. *Aguirre-Palacios v. Doe*, 2014 WL 584265, at *5.

94. DHS, *Resource Guide*, *supra* n.6, at 5 (listing certification as one of multiple factors in USCIS determining eligibility).

95. INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

96. 8 C.F.R. 214.1(a)(3)(ii).

97. DHS, *U Visa Law Enforcement Certification Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement* (January 2011), available at <http://niwaplibrary.wcl.american.edu/pubs/dhs-u-visa-guide-2012> at 4, last accessed Oct. 28, 2017.

98. DHS, *Resource Guide*, *supra* n.6, at 6. In criminal cases the criminal activity that the prosecutor chose to prosecute may be for another crime that is not a U visa listed criminal activity. This commonly occurs in prosecutions involving drugs, gangs, and firearms in which the witness may have also suffered other criminal activities that are not being prosecuted (for example, domestic violence, sexual assault, or extortion). *See*, 72 *Fed. Reg.* 53013, *supra* n.1, at 53018. (“In addition, qualifying criminal activity may occur during the commission of non-qualifying criminal activity. For varying reasons, the perpetrator may not be charged or prosecuted for the qualifying criminal activity, but instead, for the nonqualifying criminal activity. For example, in the course of investigating Federal embezzlement and fraud charges, the investigators discover that the perpetrator is also abusing his wife and children, but because there are no applicable Federal domestic violence laws, he is charged only with nonqualifying Federal embezzlement and fraud crimes.”)

99. DHS, *Resource Guide*, *supra* n.6, at 16.

100. 72 *Fed. Reg.* 53013, *supra* n.1, at 53019, 53020. (In the case of a victim who is an under-16 year old child, or a person who is incapacitated, or incompetent, the helpfulness may be provided by a parent, guardian, or next friend of the immigrant U visa applicant victim.)

101. DHS, *Resource Guide*, *supra* n.6, at 6.

102. *Id.*, at 6.

103. DHS, *Resource Guide*, *supra* n.6, at 16.

104. *Id.*, at 16.

105. DHS, *Resource Guide*, *supra* n.6, at 6.

106. DHS, *Resource Guide*, *supra* n.6, at 16.

107. DHS, *Resource Guide*, *supra* n.6, at 6.

108. *Id.*, at 6.

109. Immigration law requires every individual seeking to enter or remain lawfully in the United States to be admissible. That means that the person could be prevented from obtaining legal status if the person is found to be inadmissible. 8 U.S.C. § 1182 (a). (“Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraph are ineligible to receive visas and ineligible to be admitted to the United States.”)

110. *See* INA, § 212(d)(3); § 212(d)(14) ; 8 U.S.C. § 1182(d)(3); § 1182(d)(14).

111. *See* INA, § 212(d)(3); § 212(d)(14) ; 8 U.S.C. § 1182(d)(3); § 1182(d)(14); *See also* 72 *Fed. Reg.* 53013, *supra* n.1.

112. Benish Anver, Rocio Molina, Andrea Carcamo-Cavazos, Peter Helein, Devon E. Turner, & Spencer Cantrell, “U Visa “Helpfulness” Checklist (July 23, 2015), available at <http://niwaplibrary.wcl.american.edu/pubs/wvisa-helpfulness-checklist/>, last accessed Oct. 28, 2017 (This tool provides a list of many of the various ways a victim can provide helpfulness and provides citations to DHS regulations, policies, guidance, and publications that recognize such helpfulness as sufficient in meeting the U visa helpfulness requirement).

113. *Torres-Lopez v. Scott*, No. 2:13-CV-061-J, at 1. *But cf.* DHS, *Resource Guide*, *supra* n.6, at 4 (“A current investigation, the filing of charges, a prosecution or conviction are not required to sign the law enforcement certification.”).

114. *Aguirre-Palacios*, *supra* n.93, at *9 (stating that Plaintiff’s Motion for U visa Certification was moot because the Complaint was dismissed).

115. *In re Certification for U Visa of Nunez-Ramirez*, 2013 WL 6273961, at *10.

116. DHS, *Resource Guide*, *supra* n.6, at 19 (noting that the certifier may certify even in instances in which the prosecutor decided not to prosecute; the grand jury did not indict; the case was dismissed by the prosecutor or a judge; a case brought by the EEOC or DOL resulted in a judgment, settlement, or dismissal; a judge issued a protection order or custody ruling; a child abuse case was settled; the defendant entered a plea; or the defendant was found not guilty).

117. DHS, *Resource Guide*, *supra* n.6, at 19.

118. DHS, *Resource Guide*, *supra* n.6, at 19.

119. *Romero-Hernandez v. District of Columbia*, 141 F. Supp. 3d 29 (D. D.C. 2015) at 34.

120. It is important to note that the fact that this case at this time was dropped does not mean that the evidence that the victim provided to police and prosecutors in the case ceases to provide helpful information to law enforcement officials who can often use that information in future criminal investigations or prosecutions involving the same criminal perpetrator or enterprise. The vast majority of U visa cases involve criminal activities that have high recidivism rates (e.g., domestic violence, sexual assault, human trafficking, or stalking).
121. Alan F. Pendleton, *Immigrant Crime & U visa Certification*, Minn. Jud. Training & Educ. Blog (July 8, 2015), (Including information from conversations with DHS experts on U visa certification), available at <http://library.niwap.org/wp-content/uploads/IMM-BchCrd-UVisaNationalJudicialTrainingUpdate07.08.15.pdf>, last accessed Oct. 28, 2017.
122. For more details on judicial certification, see generally, DHS, *Resource Guide*, *supra* n.6, at 4, 6, 8, 15, 16, 19, 20; and the State Justice Institute and Office on Violence Against Women funded site the U Visa Certification Toolkit for Federal, State, and Local Judges and Magistrates, available at <http://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-tool-kit-federal-state-local-judges-magistrates/>, last accessed Oct. 28, 2017.
123. DHS, *Resource Guide*, *supra* n.6, at 6.
124. DHS, *Resource Guide*, *supra* n.6, at 4 (see note 5, “If under the age of 16 or unable to provide information due to a disability, a parent, guardian, or next friend may possess the information about the criminal activity on the individual’s behalf.”).
125. DHS, *Resource Guide*, *supra* n.6, at 6.
126. Pendleton, *supra* n.121; See also, Leslye E. Orloff, et al, *U Visa Certification Tool Kit for Federal, State and Local Judges, Commissioners, and Magistrates*, April 23, 2015. At pg 4, 7, 8, 9, 11, 17, 28, 52, 53, 54, available at <http://library.niwap.org/wp-content/uploads/2015/IMM-Tkit-UVisaCertification-02.03.14.pdf>, last accessed Oct. 28, 2017.
127. 72 *Fed. Reg.* 53013, *supra* n.1, at 53019.
128. *Id.*, at 53020 8 C.F.R. § 214.14(a)(5).
129. DHS, *Resource Guide*, *supra* n.6, at 18.
130. See generally, VAWA 2000 § 1513(a).
131. 145 *Cong. Rec.* S444 (daily ed. Jan. 19, 1999) (statement of Sen. Biden); 146 *Cong. Rec.* S10204 (daily ed. Oct. 11, 2000) (statement of Sen. Biden).
132. DHS, *Resource Guide*, *supra* n.6, at 7.
133. It is clear that this legislative history and purpose of the U visa included by the U visas congressional drafters was not considered by the court in *Nunez-Ramirez*, *supra* n.115, in which the court narrowly interpreted “helpfulness” as meaning “helpfulness to the Government” and interpreted the government that could be helped as limited to the federal judge signing the certification. The court stated that “given that federal judges must remain neutral and impartial in presiding over criminal cases, it is difficult to envision how an alien could ever be ‘helpful’ to a Federal ... judge.”
134. 72 *Fed. Reg.* 53013, *supra* n.1, at 53020 .
135. *Id.*, at 53034.
136. *Garcia v. Audubon Communities Management* 2008 WL 1774584 (E.D. La. 2008)
137. *Id.*, at *4.
138. *Id.*, at *5. It is important to note that such future helpfulness is not limited to helpfulness in criminal cases. The regulations also recognize that certifying agencies include the EEOC as an agency that detects and investigates sexual assault and other U visa criminal activities in the context of EEOC employment discrimination investigations and enforcement actions brought in federal courts. In EEOC cases, employee victims of sexual assault are eligible for certification based on their helpfulness to the EEOC without regard to whether the victims ever reported the rape or sexual assault they experienced in the workplace to law enforcement officials in addition to reporting the details of the sexual assault to the EEOC.
139. DHS, *Resource Guide*, *supra* n.6, at 10 (“Helpfulness means the victim was, is or is likely to be assisting law enforcement in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim”).
140. See 72 *Fed. Reg.* 53013, *supra* n.1, at 53020 (broadly defining “investigation” and “prosecution” to include the conviction and sentencing of the perpetrator.); see also 8 U.S.C. § 1184(p)(1).
141. *Baiju v. US Dept. of Labor*, 2014 WL 349295, at *20. See, at 53020. (broadly defining “investigation” and “prosecution” to include the conviction and sentencing of the perpetrator.); see also 8 U.S.C. § 1184(p)(1). It is important to note that while holding a broad interpretation

of helpfulness to mean helpfulness in the early or later stages of an investigation or prosecution, the *Baiju* court, following *Agaton v. Hospitality and Catering Servs., Inc.* 2013 WL 1282454 at *4 (WD La. 2013), incorrectly ruled, limiting the circumstances in which a judge may certify.

142. Pendelton, *supra* n.8; *See generally*, Anver, *et al.*, *supra* n.112.

143. DHS, *Resource Guide*, *supra* n.6, at 21.

144. DHS, *Resource Guide*, *supra* n.6, at 4.

145. *Formal Advisory Opinion*, *supra* n.36.

146. INA, § 214(p)(1), 8 U.S.C. § 1184(p)(1) (“his certification shall state that the alien “has been helpful, is being helpful, or is likely to be helpful” in the investigation or prosecution of criminal activity described in section 1101(a)(15)(U)(iii) of this title”); DHS, *Resource Guide*, *supra* n.6, at 7 (“‘Helpful’ means that the victim has been, is being, or is likely to assist law enforcement, prosecutors, judges, or other government officials in the detection, investigation, prosecution, convicting, or sentencing of the qualifying criminal activity.”).

147. DHS confirms that there are broad ranges of cases in which a judge or other government official has evidence of or observes the victim’s helpfulness in a past or ongoing investigation or prosecution in which the cases did not result in a conviction or imposition of a criminal sentence. “Law enforcement, prosecutors, judges or government officials can certify a U visa based on past, present, or the likelihood of future helpfulness of a victim. A current investigation, the filing of charges, a prosecution or conviction is not required to sign the law enforcement certification. An instance may occur where the victim has reported criminal activity, but an arrest, prosecution, or conviction cannot take place due to evidentiary or other circumstances. Examples of this include, but are not limited to, when the perpetrator has fled or is otherwise no longer in the jurisdiction, the perpetrator cannot be identified, or the perpetrator has been deported by federal law enforcement officials. There is no statute of limitations on signing the certification—one can be signed for a crime that happened many years ago or recently. A certification may also be submitted for a victim in a closed case.” DHS, *Resource Guide*, *supra* n.6, at 7.

148. Pendleton, *supra* n.121, at 3.

149. *Id.*

150. *Id.*

151. DHS, *Resource Guide*, *supra* n.6, at 19.

152. *Id.*

153. DHS, *Resource Guide*, *supra* n.6, at 4.

154. DHS, *Resource Guide*, *supra* n.6, at 3.

155. The U visa adjudication system requires the victim to submit evidence, and USCIS is responsible for finding that the victim either provided or offered ongoing cooperation or that the victim did not unreasonably refuse to cooperate with reasonable requests for assistance as part of the USCIS adjudication of the victim’s application to attain lawful permanent residency through the U visa program. *See generally* 73 *Fed. Reg.* 75540, *supra* n.80.

156. 73 *Fed. Reg.* 75540, *supra* n.80, at 75547.

157. U visa Certifications, *Advisory Opinion 2015-2* (Minn. Board on Jud. Standards June 26, 2015), available at <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>, last accessed Oct. 28, 2017.

158. *Proposed Advisory Opinion 2015-2*, *supra* n.70 at 5.

159. *Id.* (quoting Rule 2.10(A) and (D) of MN Code of Judicial Conduct).

160. *Advisory Opinion 2015-2*, *supra* n.157, at 2. The Congressional Research Service (CRS) in a report on VAWA self-petitioning and U visa programs discusses the only context in which a USCIS adjudication of a U visa could be properly considered *de novo*. Some victims applying for U visas will have filed previously for other forms of immigration relief and later qualified for a U visa. For example, a work visa holder or a student visa holder who becomes a victim of rape is able to file for a U visa. In a domestic violence case the U visa victim’s abusive husband or parent may have filed a family-based visa petition on the victim’s behalf. CRS states in its report “Foreign national victims apply for a U visa using a Form I-918, “Petition for U Nonimmigrant Status,” along with supporting documentation to USCIS’s Vermont Service Center (VSC). USCIS conducts a *de novo* review of all evidence submitted. This is as if the VSC were considering the question for the first time. Hence, USCIS may evaluate evidence previously submitted for other immigration benefits but is not bound by its previous decisions. Petitioners subject to final orders of removal may still be removed during adjudication of their U visa petitions. 8 C.F.R. 214.14(c). Kandel, *supra* n.72, at 32.

161. DHS, *Resource Guide*, *supra* n.6, at 16.

162. DHS, *Resource Guide*, *supra* n.6, at 3 (“USCIS is the federal component of the Department of Homeland Security (DHS) responsible for adjudicating (approving or denying) U and T visa applications.” (emphasis added)).

163. *See* 8 C.F.R. § 214.14(c)(4) (emphasis added) (noting in addition that “USCIS will determine, in its sole discretion, the evidentiary value of previously or concurrently submitted evidence, including [certification]”).

164. *Advisory Opinion 2015-2*, *supra* n.157, 1.

165. *Id.*

166. 72 *Fed. Reg.* 53013, *supra* n.1, at 53016. This quote discusses the “AG Guidelines” upon which USCIS relies in developing the approach it took to the U visa regulations with regard to defining “investigation or prosecution” to include detection, conviction and sentencing. *See, Attorney General Guidelines for Victim and Witness Assistance*, at 9 (May 2005), available at https://www.justice.gov/archive/olp/ag_guidelines.pdf, last accessed Oct. 28, 2017.

167. DHS, *Resource Guide*, *supra* n.6, at 7 (stating a prosecution or conviction is not required to sign a certification).

168. 72 *Fed. Reg.* 53013, *supra* n.1, at 53019.

169. DHS, *Resource Guide*, *supra* n.6, at 19.

170. *Id.*

171. *Id.*

172. *Id.*

173. DHS, *Resource Guide*, *supra* n.6, at 10–11.

174. *Advisory Opinion 2015-2*, *supra* n.157, at 1.

175. *Id.*

176. *Id.*, at 1, 7.

177. *Id.*, at 4.

178. *See generally*, Pendelton, *supra* n.8.

179. *Advisory Opinion 2015-2*, *supra* n.157, at 5 and 1–8.

180. Courts may see fewer U visa certification requests in pending cases because the U visa applications filed with

DHS are afforded Violence Against Women Act (VAWA) confidentiality protection, which as a matter of federal law precludes DHS from revealing the existence of the case, information contained in case files, and information about actions taken in the case. *See*, Leslye E. Orloff, “VAWA Confidentiality Statutes, Legislative History, and Implementing Policies” (Feb. 23, 2017) available at <http://niwaplrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>, last accessed Oct. 28, 2017. Victims seeking U visa certification from courts in open cases need to evaluate safety concerns related to that request due to the courts’ ethical obligations to provide notice of the request to parties. Information about and contained in VAWA confidentiality protected cases is not discoverable in civil and criminal court cases. *See* Veronica T. Thronson, Carole Angel, Soraya Fata, Rocío Molina, Benish Anver, Kalli Wells & Leslye E. Orloff, “Utilizing VAWA Confidentiality Protections In Family Court Proceedings” (Feb. 17, 2017) available at <http://niwaplrary.wcl.american.edu/pubs/utilizing-vawa-confidentiality-protections-family-court/>, last accessed at Oct. 28, 2017. However, the U visa certification itself in criminal court cases will generally be discoverable. Jane Anderson, Leslye E. Orloff, & Benish Anver, “VAWA Confidentiality and Criminal Cases: How Prosecutors Should Respond to Discovery Attempts for Protected Information” (July 1, 2017) available at <http://niwaplrary.wcl.american.edu/>, last accessed Oct. 28, 2017.

181. *See generally*, *Advisory Opinion 2015-2*, *supra* n.157, 6–7.

182. *See Garcia*, *supra* n.136, at *4 (“It is undisputed that a judge is qualified to certify U visa applications”); *See In re Rosales*, 40 Misc. 3d 1216(A) (N.Y. Fam. Ct. 2013) (unreported table disposition); *Agaton*, *supra* n.141; *Villegas v. Metro. Gov’t of Nashville*, 907 F. Supp. 2d 907, 912 (M.D. Tenn. 2012).

183. *See Agaton*.

184. *Id.*, citing *Garcia v. Audubon Communities Mgmt.*, 2008 WL 1774584, at *2–4 and *Villegas v. Metro. Gov’t of Nashville*, 2012 WL 4329034 at *5.

185. *Agaton*, *supra* n.182, at *4.

186. *Id.*, at *5.

187. *Id.*, (ruling that judge must have presided over the criminal case); *See Baiju*, *supra* n.141, at *20 (ruling that judicial certification requires a pending investigation or prosecution and that judge must have presided over the case); *Nunez-Ramirez*, *supra* n.115, at *5 (ruling that the

certifying judge must have been the presiding judge); *Villars v. Kubiatuski*, 45 F.Supp.3d 791, 811 (N.D. Ill. 2014) (ruling that certifying judge must be the presiding judge); *Romero-Hernandez*, *supra* n.119, at 34 (ruling that certifying judge must be the presiding judge); *Matter of Patricia C.*, 2016 NY Slip Op 51809 (U) (ruling that certification requires a criminal proceeding); *Matter of Clara F.*, 52 Misc. 3d 640 (NY Family Court 2016) at *645 (ruling that the proceedings must be a criminal proceeding).

188. *Nunez-Ramirez*, *supra* n.115 at *4, *5

189. *Aguirre-Palacios*, *supra* n.93 at *5 (“Even if Plaintiff’s motion were not moot, however, this Court’s general federal question jurisdiction pursuant to *Bivens* does not extend so far as to confer further jurisdiction over questions of Plaintiff’s eligibility for a U-Visa”).

190. See *Agaton*, *supra* n.182; *Baiju*, *supra* n.141; *Nunez-Ramirez*, *supra* n.115; *Aguirre-Palacios*, *supra* n.93; *Romero-Hernandez*, *supra* n.119; *Patricia C.*, *supra* n.187; *Matter of Clara F.*, *supra* n.187.

191. *Baiju*, *supra* n.141, at *20 (denying certification as there was “no evidence of any possible pending investigation or prosecution of the qualifying crimes.”); *Agaton*, *supra* n.182, at *4 (having denied certification because there was no pending investigation or prosecution); *Torres-Lopez v. Scott*, No. 2:13-CV-061-J, at 1–2 (stating “Federal judges are authorized officials when they have some responsibility for investigation or prosecution of the relevant crime—that is, when the victim could help the judge fulfill her responsibility.”).

192. Advisory Opinion 2015-2, *supra* n.157, 1, 6.

193. *Garcia*, *supra* n.136, at *4.

194. *Villegas*, *supra* n.182 at 912.

195. DHS, *Resource Guide*, *supra* n.6, at 10–11.

196. *Id.*, at 19.

197. *Id.*, at 18.

198. *Id.*, at 6

199. *Id.*, at 6.

200. INA § 214(o)(1); 8 U.S.C. § 1184(o)(1) (DHS will generally only sign U visa certifications with regard to criminal activities that have occurred in immigration detention).

201. DHS, *Resource Guide*, *supra* n.6, at 16.

202. *Id.*

203. See VAWA 2000, § 1513(c); INA §101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III); DHS, *Resource Guide*, *supra* n.6, at 16.

204. *Id.*, at 6.

205. *Id.*, at 19.

206. *Id.*

207. *Id.*, at 15 (Victims are U visa eligible if they offer helpfulness to government officials not limited to law enforcement, prosecutors, and judges. Examples include: child and adult protective services workers, the EEOC, and state departments of labor).

208. DHS, *Resource Guide*, *supra* n.6, at 6.

209. *Id.*

210. *Proposed Advisory Opinion 2015-2*, *supra* n.70.

211. DHS, *Resource Guide*, *supra* n.6, at 10.

212. *Formal Advisory Opinion*, *supra* n.36.

213. *ABA Model Code of Judicial Conduct*, Canon 3, Rule 3.2, Comment [1] (“Judges possess special expertise in matters of law, the legal system, and the administration of justice, and may properly share that expertise with governmental bodies and executive or legislative branch officials.”)

214. DHS, *Resource Guide*, *supra* n.6, at 6.

215. 8 CFR § 214.14(c)(4) & (f)(5); 72 *Fed. Reg.* 53013, *supra* n.1 at 53026.

216. DHS, *Resource Guide*, *supra* n.6, at 5 (stating that USCIS reviews the victim’s affidavit, police reports, court documents, and witness affidavits in their adjudication of the petition).

217. *Id.*, at 6.

218. *Id.*, at 26.

219. *Id.*

220. *Id.*

221. *Id.*, at 14.

222. *Id.*, at 26 (stating that a certifier with concerns over a victim's criminal history should cite that information in the certification or attach a report detailing the victim's criminal history).
223. *Id.*
224. *Matter of Clara F.*, *supra* n.187 at 645; *Matter of Patricia C.*, *supra* n.187, at *6; *Romero-Hernandez*, *supra* n.119, at 34; *Agaton*, *supra* n.141, at *4; *Baiju*, *supra* n.141, at *19.
225. See generally DHS, *Resource Guide*, *supra* n.6, at 6, 19, 20.
226. *Id.*, at 6, 18–19.
227. *Id.*, at 6, 16.
228. *Id.*, at 19.
229. *Id.*
230. *Id.*, at 22.
231. *Id.*, at 22–23.
232. *Id.*, at 23.
233. *Id.*, at 15.
234. Klein, C., & Orloff, L. E. (1993). "Providing legal protection for battered women: An analysis of state statutes and case law," *Hofstra Law Review: Symposium Issue on Domestic Violence*, 801–814 (801).
235. *Id.*, at 849–859 (A wide range of criminal acts may form the basis for a civil protection order. State statutes specifically authorize protection orders based on almost any criminal act); *Id.* at 814–843 (When a criminal act is committed by a person with whom the victim has a relationship covered by the state protection order statute, courts have jurisdiction to issue a protection order).
236. See generally DHS, *Resource Guide*, *supra* n.6, at 19, 22.
237. *Matter of Rosales*, *supra* n.182.
238. *Id.*
239. VAWA 2000, § 1513(1)(A)-(B); DHS, *Resource Guide*, *supra* n.6, at 7, 19.
240. *Agaton*, *supra* n.141, at *7–*8 (the court emphasized the meaning of "responsible" within the context of the statutory language and used this to explain why judges who did not preside over the initial case could not certify).
241. DHS, *Resource Guide*, *supra* n.6, at 16.
242. *Matter of Rosales*, *supra* n.182 (holding that the information gleaned from these materials was a sufficient basis to complete the Form I-918 Supplement B).
243. *Id.*
244. 72 *Fed. Reg.* 53013, *supra* n.1, at 53020.
245. *Pendelton*, *supra* n.8 at 5.
246. DHS, *Resource Guide*, *supra* n.6, at 7, 19.
247. INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).
248. INA § 101(a)(27); 8 U.S.C. § 1101 (a)(27).