

U Visa Certification By Judges: Legislative/Regulatory History and Judicial Ethics

NIWAP, American University,

Washington College of Law

Crime Victim Certification Steering Committee

Washington State

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Introductions

- Judge Rosemary Collins (Ret.)
 - Rockford, Illinois
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 - NIWAP, American University, Washington College of Law

Learning Objectives

By the end of this training you will be better able to:

- Sign U and T visa certifications
- Implement procedures for signing U or T visa certifications in family, civil, and criminal cases that are consistent with federal law

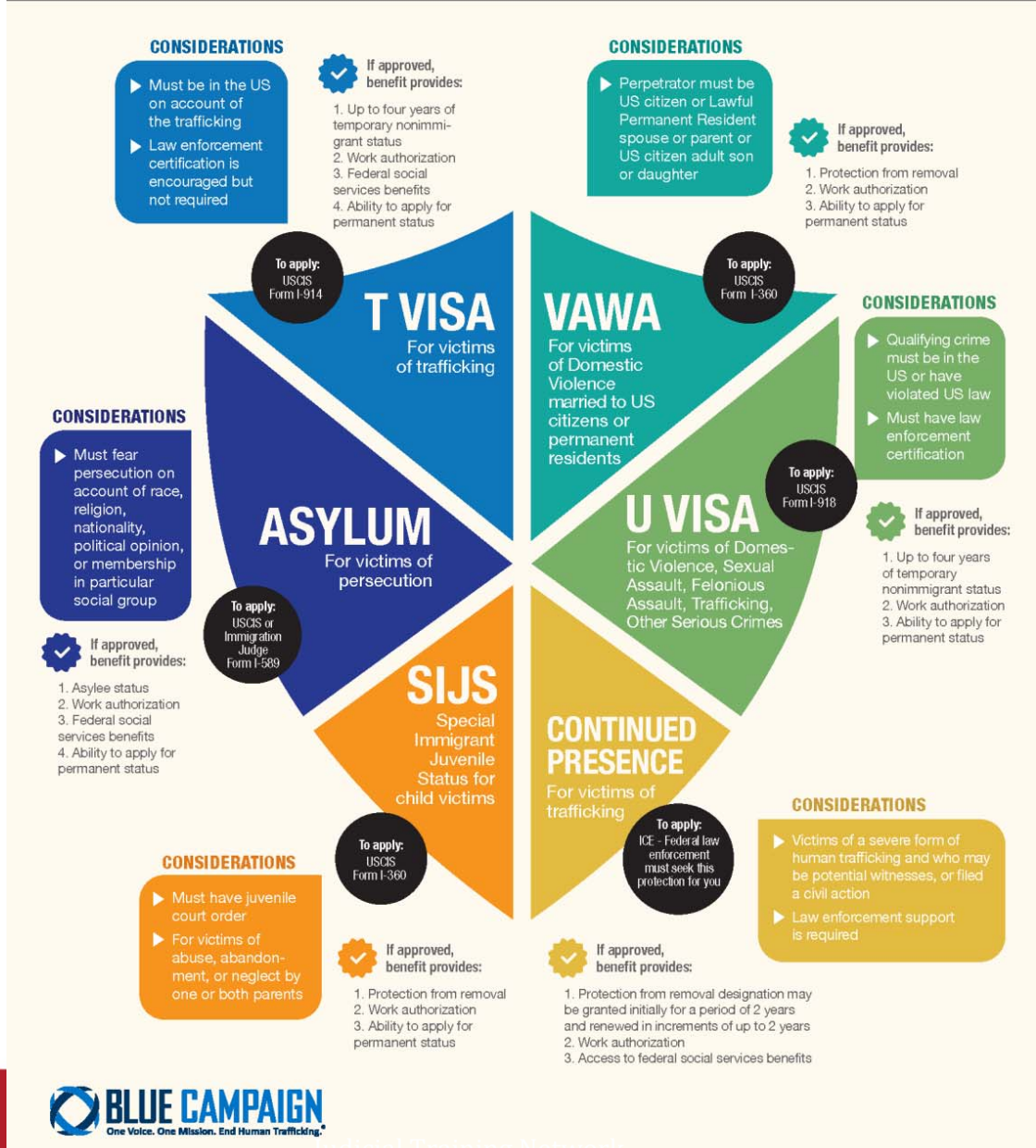
**Many Immigrant Victims of
Domestic Violence, Sexual Assault,
and Other Crimes Are Eligible for
Immigration Relief**

Immigration Relief Available for Immigrant Victims of —

- Domestic violence
 - Child abuse
- Sexual assault
- Rape
- Incest
- Prostitution
- Torture
- Felonious assault
- Manslaughter
- Murder
- Female genital mutilation
- Kidnapping
- Abduction
- Trafficking
- Involuntary servitude
- Slave trade
- Being held hostage
- Fraud Foreign Labor Contracting
- Peonage
- False Imprisonment
- Blackmail
- Extortion
- Witness tampering
- Obstruction of justice
- Perjury
- Stalking
- **Parent perpetrated**
 - **Child abuse**
 - **Child neglect**
 - **Child abandonment**

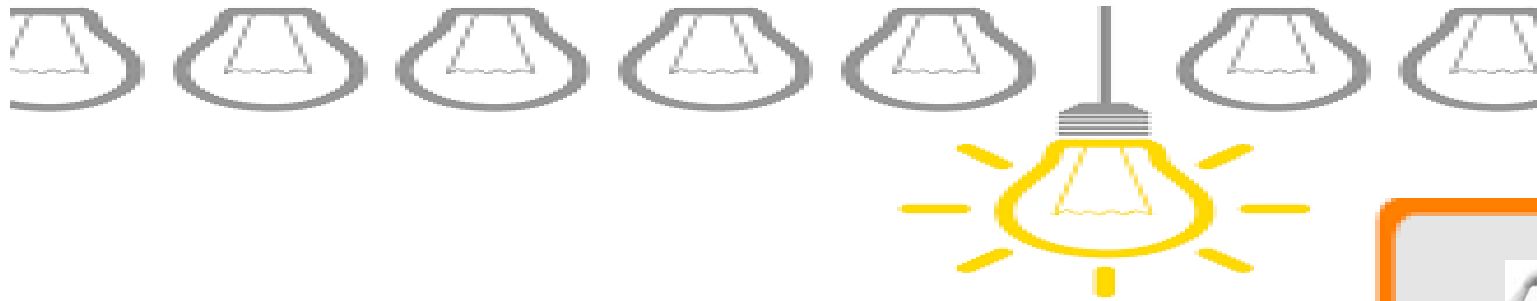
Attempt, conspiracy, or solicitation to commit any of these crimes or any similar activity

PROTECTIONS FOR IMMIGRANT VICTIMS





U Visa Certification by Judges



What are some of the questions and issues you have or see in your state with regard to U visa certification by judges?



Purpose of Crime Victim Protections

Congress enacted VAWA self-petitioning (1994) and the U and T visas (2000) to:

- Improve community policing and community relationships
- Increase prosecution of perpetrators of crimes against immigrant victims
- Allow victims to report crimes and seek help from courts without fear of deportation
- Improve access to justice from family/criminal/civil courts for victims of domestic & sexual violence and child/elder abuse
- Enhance victim safety
- Keep communities safe

Legislative Intent

- We want crimes reported to police
- No one should be a victim of crime, especially violent crime
- Offenders prey upon the most vulnerable in our communities, often immigrants
- Without victims reporting crimes, we don't know about the most dangerous offenders
 - Domestic violence
 - Sexual violence

Goals of Immigration Relief

Prosecutions

**Community-
police
relations**

Improve

**Reporting of
crime**

**Safety of victims,
communities, and
police**

Benefits for Survivors

- Protection from deportation
- Access to legal immigration status
 - Can include children in application
- Financial independence from perpetrator
 - Legal work authorization (3 months – 6 years from filing)
 - Issuance of federally recognized ID
- VAWA confidentiality
- Greater access to public benefits and services

DHS VAWA Confidentiality Computer System

- Directs use of “red flag” “384” computer system to identify victims who have already filed for or have been granted victim-based immigration relief
- Reminds immigration officers, agents, attorneys about immigration law protections for
 - Victims of domestic violence
 - Crime victims
 - Human trafficking victims

Story: How Immigration Relief for Victims Improves Community Safety

U Visa Requirements

Victim

- Qualifying criminal activity
- Possesses information about the crime
- Criminal activity occurred in U.S. or violated U.S. law

Helpful

- Has been, is being, or is likely to be
- Detection, investigation, prosecution, conviction, or sentencing

Harm

- Substantial physical or mental abuse as a result

Qualifying Criminal Activity

Abduction	Hostage	Sexual Assault
Abusive Sexual Contact	Incest	Sexual Exploitation
Blackmail	Involuntary Servitude	Slave Trade
Domestic Violence	Kidnapping	Stalking
Extortion	Manslaughter	Torture
False Imprisonment	Murder	Trafficking
Felonious Assault	Obstruction of Justice	Witness Tampering
Female Genital Mutilation	Peonage	Unlawful Criminal Restraint
Fraud in Foreign Labor Contracting	Perjury	Prostitution
Rape	Attempt, conspiracy or solicitation to commit crime or similar activity	

U Visa Statistics (11/2011)

76.1% = Domestic Violence, Sexual Assault, Child/Elder Abuse, Human Trafficking

% of U Visas	Criminal Activity
45.9%	Domestic Violence
30.4%	Rape, Sexual Assault, Incest, Human Trafficking
9.9%	Felonious Assault, Murder, Manslaughter
8.47%	Kidnapping, Being Held Hostage, Unlawful Criminal Restraint, Torture
5.3%	Blackmail, Extortion, Perjury, Obstruction of Justice, Attempts, Conspiracy, Solicitation

Who can apply?

- Victims of qualifying criminal activity
- Parents and guardians can apply as an “indirect victim” if:
 - the victim is a child under 21 years of age and/or
 - is incompetent, incapacitated, or deceased due to murder or manslaughter
- Bystanders victimization — very limited
- For child victims, a “next friend” can provide helpfulness

U/T Visa Certification: Who Can Certify?

- Federal, state, and local
 - Police, sheriffs, FBI, HSI, ATF...
 - Prosecutors
 - Judges, Magistrates, Commissioners, Judicial Referees, Masters, Alderman, ALJs, Surrogates, Chancellors
- Departments of Labor (DOL) and the Equal Employment Opportunity Commission (EEOC)
- Child and Elder Abuse investigators and agencies
- Other government agencies

Washington Substitute House Bill 1022

- Requires certifying agencies to make certification decisions within
 - 90 days issuance and reissuance
 - 14 days if removal proceedings or 20 year old child within 90 days of turning 21
- Head of certifying agency shall appoint designee
- Requires language access, confidentiality and reporting
- Authorizes withdrawal only upon unreasonable refusal to provide assistance reasonably requested
- Operates in addition to federal law

U Visa Certification May be Signed by any Judicial Official

- Judicial officers who can sign U visa certification:
 - 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.



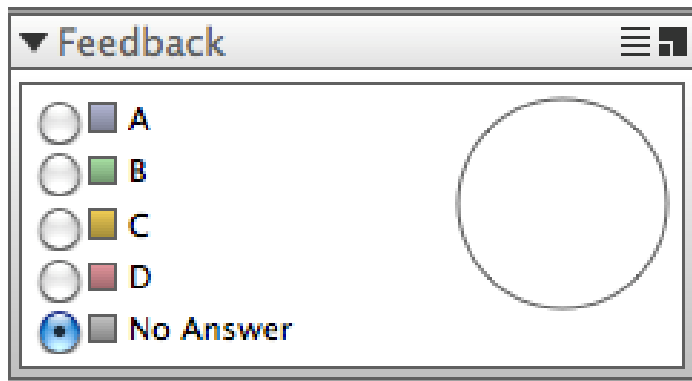
Question: The judge signing the U visa certification must be the judge who presided over a case involving the victim seeking certification?

TRUE

FALSE

Why would victims seek U visa certification from state courts?

Using your clickers please check:



- A. Only justice system contact a custody, protection order, civil employment or child welfare case
- B. No language access to police when victim called for help
- C. Judge observed victim's attendance and participation in criminal case
- D. All of the above

Court Decisions U Visas in Many Jurisdictions

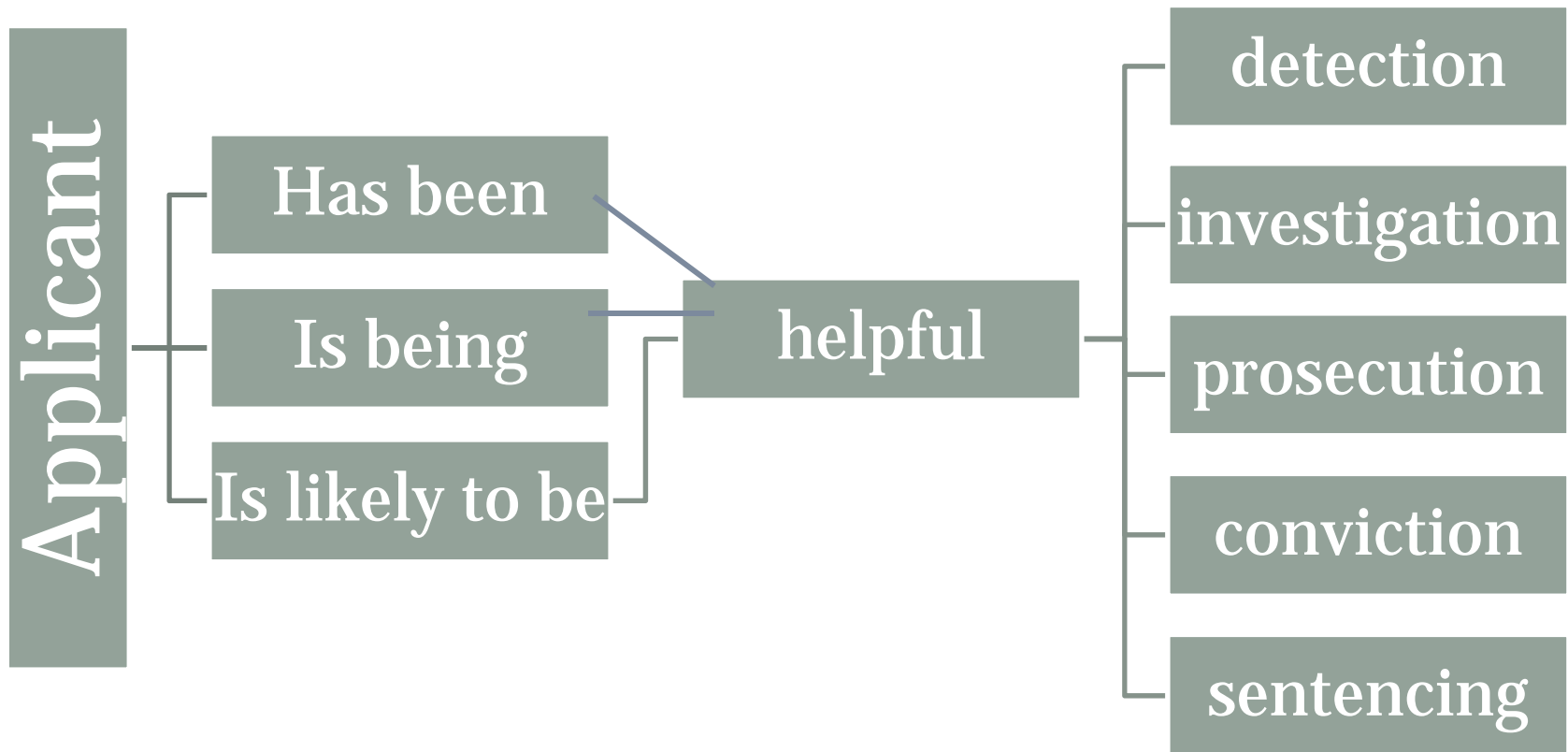
- Published decisions by courts commonly contain legally incorrect information about the U visa program and U visa certification
 - These decisions do not reference or follow Chevron Deference requirements
- Chevron Deference required when courts interpret federal statutes to:
 - Legislative history
 - U visa regulations and regulatory history (Preamble)
 - DHS policies and training materials

U Visa Regulations Definitions

Although terms are used interchangeably

- As a matter of law (U visa regulations)
 - Helpfulness in the “investigation or prosecution” always means
 - “Detection, investigation, prosecution, conviction, or sentencing”
 - “Crime” always means
 - “criminal activity”
- “Criminal activity” chosen to offer early access to justice system protection
 - Improving stability for crime victims

Helpfulness



What Evidence of “Criminal Activities” and “Helpfulness” Could be Present in These Cases?

- Family
 - ✓ Civil Protection
 - ✓ Custody
 - ✓ Divorce
 - ✓ Paternity
 - ✓ Adoption
- Juvenile
 - ✓ Child Abuse, Neglect, or Termination of Parental Rights
 - ✓ Delinquency
- Criminal
- Probate
 - ✓ Elder / Dependent Adult Abuse
 - ✓ Guardianship
 - ✓ Conservatorship
- Civil
 - ✓ Employment
 - ✓ Tort damages against a perpetrator

Criminal Case Examples: Evidence of Helpfulness

- Evidence in case that the victim:
 - Called 911
 - Participated in a criminal investigation
 - Identified perpetrator at line up
 - Testified before a grand jury or at trial
 - Appearance in a case
 - Attended criminal court hearings in the case
 - Victim impact statement
 - Testimony at sentencing

Family/Civil Case Examples: Evidence of Helpfulness

- Filed and/ or appeared at hearing for full protection order
- Plead and or testified about abuse or sexual assault in a court case (e.g. protection order, divorce, custody, small claims, housing, employment)
- Evidence in case that victim called the police, made a police report, cooperated in a criminal or EEOC investigation
- Serving the perpetrator with notice of a
 - temporary protection order
 - A case in which the pleadings contain allegations of facts that constitute domestic violence, sexual assault or other U visa criminal activities

According to DHS, a U/T Visa Certification Tells USCIS Only 3 Things:

- Certifier believes the applicant is a victim of a qualifying criminal activity
- Victim had knowledge of the criminal activity
- Victim was, is, **or** is likely to be helpful in the detection, investigation, prosecution, conviction or sentencing

When Deciding About Signing a Certification

- Question is **NOT**:
 - Is/was there a criminal case filed?
 - Was there an arrest of the offender?
 - Do I have proof beyond a reasonable doubt?
 - Is this within the statute of limitations?
 - Was there a conviction?

Helpfulness Requirement Met *Even When*:

- Victim reports a crime, but no further investigation or prosecution
- Perpetrator absconds or is deported
- Perpetrator is being prosecuted for a different crime
- Case was closed/completed a long time ago
- Victim is not needed as a witness
- Victim is dead (indirect victim is applying)
- Perpetrator is dead
- The criminal case did not result in a guilty plea or conviction
- Victim is applying for a civil protection order or custody but domestic violence is not being criminally prosecuted

Large Group Discussion



Ethical Considerations:

What are the ethical considerations with regard to U visa certification by judges that you have encountered, have been asked about, or have questions about?



Minnesota Judicial Ethics Opinion U Visa Certification (June 26, 2015)

- Judge may sign certifications when
 - “adequate basis for the averments made in the certification”
- Certification after the criminal or civil case is completed does not raise impartiality issues
 - In open cases should disclose certification to the parties
- Certification describes immigrant victim’s past/present helpfulness -- Does not vouch for character
- In civil and criminal cases, whether to sign a U visa certification is a an issue of law that does not implicate judicial ethics codes

Full Opinion Available at: <http://www.bjs.state.mn.us/file/advisory-opinions/opinion-2015-2-final.pdf>
Hon. Pendleton also published a training update based on the opinion at <http://pendletonupdates.com/>

Inaccuracies in North Carolina Ethics Opinion Not Addressed by Minnesota

- Investigation or prosecution =
 - Detection , investigation, prosecution, conviction,
or sentencing
- U visa ≠ preferential status
- Judges certify on past or present (not future) helpfulness
- Judges generally sign after having made findings and the case is concluded

U Visa Statute

INA 245(m)(1); 8 U.S.C. 1255(m)(1)

- Allows a U visa to be granted when
 - The victim is, was, or is likely to be helpful
- Once the victim's case is filed
 - The victim may not unreasonably refuse to provide assistance 8 C.F.R. 245.24(b)(5)
- U visa regulations 8 C.F.R 214.14(b)(3)
 - Require that requests for assistance be reasonable

Reasonableness of Request 8 C.F.R. 245.24(a)(5)

- May refuse if the requests for assistance were unreasonable 8 C.F.R. 245.24(e)(2)(ii)
 - Consider general law enforcement, prosecutorial, judicial practices
 - The kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud
 - The nature of the request to the alien for assistance.

Large Group Discussion



From your experience with domestic violence and sexual assault cases, why might a victim not follow through with a court case?



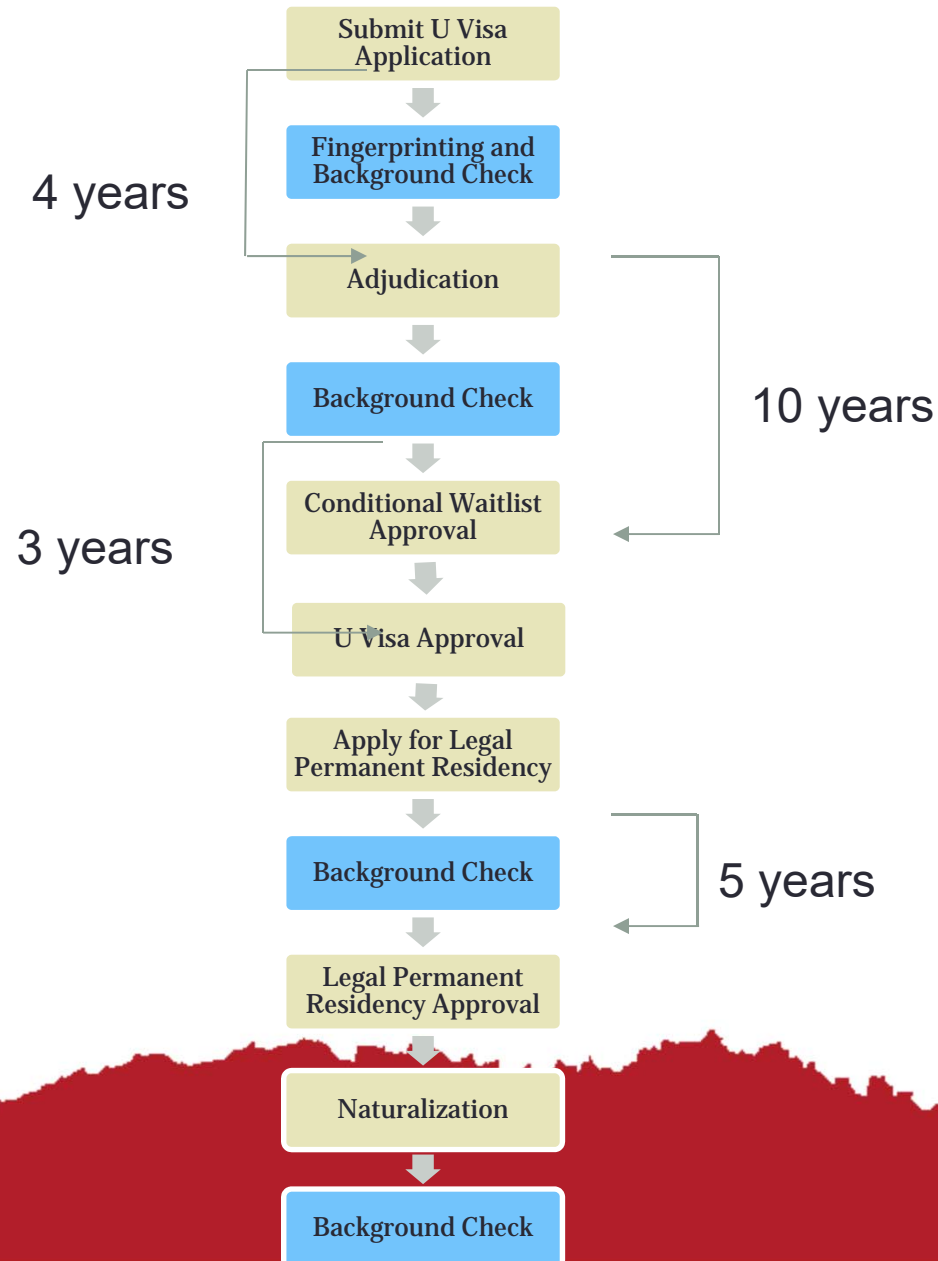
Reasons for Refusing to Cooperate

- Fear of reprisal
- Continued threats of violence
- Pressure from either family
- Financial hardship
- Lesser of two evils

Evaluating Whether Victim's Refusal to Provide Assistance/Cooperation was "Unreasonable" – Regulations 245.24(a)(5)

- Considerations:
 - Totality of the circumstances, including the nature of the victimization
 - Victim's fear of the abuser
 - Trauma suffered
 - Force, fraud, or coercion

U Visa Process Timeline



2012 U Visa & Lawful Permanent Residency Survey

- 70% of U visa applicants/holders provided continued cooperation to law enforcement, prosecutors, or the EEOC
- 29.5% of victims were willing to cooperate but officials did not seek further cooperation

After Immigration Case is Filed Immigrant Victim's Justice System Use

- Protection orders – VAWA 47.6%, U visa 43.7%
- Filed a police report - VAWA 36.2%, U visa 50.3%
- Helped in a criminal case - VAWA 33.4%, U visa 73.1%
- Divorce – VAWA 32.1%, U visa 19.5%
- Child custody – VAWA 20.1%, U visa 17.9%
- Child support – VAWA 26.1%, U visa 10.7%

U Visa Facts

- Only 10,000 U visas can be granted annually
- The U visa grants a temporary 4 year stay
- Work authorization (≈28–48 months)
- Only some U visa holders will qualify for lawful permanent residency — no guarantee
- U.S. citizenship can only be attained after lawful permanent residency for 5 years + proof of good moral character

U Visa Application Process

**Filing to decision:
Decision to receipt of U Visa
(4 to 6 years):**

Certification
Mandatory

Application &
supporting
documentation

Decision by
DHS

Part 6. Certification

I am the head of the agency listed in **Part 2**, or I am the person in the agency who was specifically designated by the head of the agency to issue a U Nonimmigrant Status Certification on behalf of the agency. ~~Based upon investigation~~ of the facts, I certify, under penalty of perjury, that the individual identified in **Part 1** is or was a victim of one or more of the crimes listed in **Part 3**. I certify that the above information is complete, true, and correct to the best of my knowledge, and that I have made and will make no promises regarding the above victim's ability to obtain a visa from U.S. Citizenship and Immigration Services (USCIS), based upon this certification. I further certify that if the victim unreasonably refuses to assist in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim, I will notify USCIS.

1. Signature of Certifying Official (sign in ink)



2. Date of Signature (mm/dd/yyyy)

3. Daytime Telephone Number

4. Fax Number

Judges can amend the form

Examples: Based upon ...

- My findings of fact or ruling in [name type of proceeding]
- Probable cause
- My issuance of a protection order
- My sentencing of the defendant
- My having presided over a criminal case

REMEMBER: This is a certification that you believe the applicant was a victim of a crime.

Certification provides evidence to DHS.

DHS adjudicates and decides whether to grant the victim immigration relief.

Resource

together with any attachments (e.g. a copy of a court order, photo)²³ should be returned directly to the applicant (or counsel), not to USCIS.²⁴

Judges sign certifications based on information from a variety of sources that include but are not limited to: court's records, transcripts, evidence, court findings, court orders, testimony, and conversations with and notes from any judicial officer involved with the matter. Since judges sign certifications based on factors other than their "investigation of the facts" judges signing U visa certifications may need to amend the U visa certification form to reflect the judges' basis for certification, which can include amendments similar to the following examples:

- Based on my findings and issuance of a protection order
- Based on my finding of probable cause
- Based on my finding in a (custody/divorce/child abuse) case
- Based upon my presiding over the case and hearing evidence
- Based on my review of the court records

The certifying judicial officer may request additional information and/or documents from

San Francisco Superior Court Civil Division U Visa Certification Protocol

Resource

<http://niwaplibrary.wcl.american.edu/wp-content/uploads/2015/IMM-Tkit-UVisaCertification-02.03.14.pdf>



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**U VISA CERTIFICATION
TOOLKIT**
for
**FEDERAL, STATE AND LOCAL
JUDGES, COMMISSIONERS,
MAGISTRATES AND OTHER JUDICIAL
OFFICERS**

NIWAP

Judicial Training Network

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Materials on Webpage in NIWAP Library

- U Visa Certification Toolkit for Judges
- Tip Sheet for Courts on U Certification
- San Francisco U Certification Protocol
- Immigration Remedies Identification Tool for Courts
- Article: Understanding the Judicial Role in U Visa Certification
 - Comparing DHS regulations, policies, publications and court cases
- *Chevron* handout
- And much more...

Question and Answer Discussion



Technical Assistance and Materials

- Power Point presentations and materials for this conference at
 - <http://niwaplibrary.wcl.american.edu/CVCSC2019/>
- Judicial Training Manual at
 - <http://niwaplibrary.wcl.american.edu/sji-materials/>
- **NIWAP Technical Assistance:**
 - Call (202) 274-4457
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