

U Visa Certification:

Ethical Considerations for Judicial Officers

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U Visa Certification: Ethical Considerations for Judicial Officers¹

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December 31, 2024

I. Introduction

The U visa is the result of a bipartisan effort to create a crime-fighting tool, to enhance access to justice, and to provide humanitarian relief for victims of crime.² In the Violence Against Women Act (VAWA 2000), Congress created the U visa to strengthen the justice system's ability to detect, investigate, prosecute, convict, and sentence perpetrators of crime, especially crimes involving domestic violence, child abuse, sexual assault, human trafficking, and other qualifying criminal activities.³ The U visa offers significant protections to many immigrant victims who often fall prey to such criminal activity. One way the U visa achieves these goals is by offering victims access to humanitarian immigration relief, which affords them a path to lawful permanent residency.⁴

One critical step in the U visa process is U visa certification. U visa certifications can be completed by any federal, state, tribal, territorial, or local judge, law enforcement, prosecutor, or other government agency that has the responsibility to detect, investigate, prosecute, convict or sentence in cases involving qualifying criminal activity. This includes any judicial official with delegated authority from a federal, state, local, tribal or territorial court. Agencies with criminal, civil, or administrative investigative jurisdiction can also certify.⁵

¹ This project was supported by Grant No.15JOVW-21-GK-02256-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/ exhibition are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice. The recipient also agrees to ensure that any subrecipient at any tier will comply with this condition.

The opinions expressed in this article are those of the authors and are based on the authors' experience and expertise on U.S. immigration laws and how issues about federal immigration laws arise in state court proceedings. This is not intended to be a substitute for settled law in any particular jurisdiction.

² See Violence Against Women Act (VAWA)2000, Pub. L. No. 106-386, § 1513(a)(2)(A), 114 Stat. 1464.

³ See generally, VAWA 2000, Pub. L. No. 106-386, § 1513(a), 114 Stat. 1464.

⁴ See generally Katrina Castillo et al., Legislative History of VAWA (94, 00, 05), T an U-Visas, Battered Spouse Waiver, and VAWA Confidentiality, (January 5, 2023), <https://niwaplibrary.wcl.american.edu/pubs/vawa-t-u-leg-history/>.

⁵ DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015 at 6, <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>.

As judges across the country undertake the role of U visa certification assigned to courts by Congress it is important for judges, courts and judicial ethics boards, to be aware of the most up to date, legally accurate information about U visa immigration laws, as well as where to go to ensure that they are applying legally correct information.⁶

Immigration laws are complex, nuanced, and evolving. State courts and judicial ethics boards are best able to make informed legally accurate decisions, rulings, and opinions about U visa immigration laws when they rely upon the full range of information on the program developed by the U.S. Department of Homeland Security (DHS) or supported by the U.S. Department of Justice (DOJ) and the State Justice Institute (SJI).

U visa laws are comprised of several component parts. First is Congress, which created the statute and legislative history.⁷ Second are agencies. DHS and U.S. Citizenship and Immigration Services (USCIS) which are responsible for issuing U visa regulations, regulatory history,⁸ policies, policy manuals,⁹ and publications.¹⁰ Together these provide legally accurate information on the U visa program for U visa certifiers, including judges, and for U visa applicants and adjudicators. DHS and USCIS policy manuals and resource guides provide detailed explanations about the U visa program that are grounded in the statutes and regulations, the legislative and regulatory history, as well as the agency's expertise as adjudicators.

⁶ See, U and T Visa Training Materials (July 12, 2024), <https://niwaplibrary.wcl.american.edu/pubs/u-and-t-certification-training-materials/> (Includes all DHS publications on the U visa including regulations, regulatory history, the USCIS policy manual, policies, and DHS and USCIS issued publications, DOJ and SJI supported training materials for judges and state courts on U visa certification, benchcards, webinars, journal articles, and other training tools).

⁷ See generally Katrina Castillo et al., *Legislative History of VAWA (94, 00, 05), T and U-Visas, Battered Spouse Waiver, and VAWA Confidentiality*, (January 5, 2023). <https://niwaplibrary.wcl.american.edu/pubs/vawa-t-u-leg-history/>.

⁸ Federal Register: New Classification for Victims of Criminal Activity for Eligibility for "U" Nonimmigrant Status (U Visa Regulations) (September 17, 2007), <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>.

⁹ USCIS, POLICY MANUAL, VOLUME 3 HUMANITARIAN PROTECTION AND PAROLE, PART C VICTIMS OF CRIME, <https://www.uscis.gov/policy-manual/volume-3-part-c>.

¹⁰ USCIS, Victims of Criminal Activity: U Nonimmigrant Status, <https://www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status>; USCIS, POLICY MANUAL, VOLUME 3 HUMANITARIAN PROTECTION AND PAROLE, PART C VICTIMS OF CRIME, <https://www.uscis.gov/policy-manual/volume-3-part-c>; U.S. Citizenship and Immigration Services U Visa Regulations, Policies and Publications, <https://niwaplibrary.wcl.american.edu/uscis-u-visa-regs-policies-pubs/>.

A U visa certification toolkit, designed specifically to provide courts with easily accessible, legally correct information on U visa certification has been funded by the Office on Violence Against Women at the U.S. Department of Justice and the State Justice Institute. This toolkit also provides legally accurate information on the T visa for victims of human trafficking.¹¹

This guidance document will focus specifically on when and how state, federal and tribal court judges can ethically sign U visa certifications¹² under the guidance provided by the American Bar Association's Model Code of Judicial Ethics (ABA Model Code) since most state's Codes of Judicial Conduct are closely aligned with the ABA Model Code.¹³ First Section II of this document provides a brief introduction to the U visa program, focusing on common misunderstandings about immigration law and the U visa program that arise in Judicial Ethics Board opinions and court cases.¹⁴

¹¹ U Visa Certification and T visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers (June 17, 2021), <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2/>.

¹² This article focuses on U visa certification, however Congress and DHS through implementing regulations, policies and publication have confirmed that they may play a similar role as certifiers of T visa declarations in cases of immigrant victims of human trafficking (sex or labor, adults and children). Since the T visa declaration is a preferred piece of evidence in a T visa application, but is not mandatory, judges will see fewer T visa certification requests. The same ethical considerations discussed in this article apply to T visa declarations signed by judges. For information on T visa declarations and the T visa program see, *T- Visa Law Enforcement Resource Guide* (October 20, 2021), <https://niwaplibrary.wcl.american.edu/pubs/t-visa-law-enforcement-resource-guide/>; *T Visa Regulations: 2002, 2016 & 2024 – Regulations, Comparison, and Regulatory History* (June 24, 2024), <https://niwaplibrary.wcl.american.edu/pubs/t-visa-regs-reg-history/>. Judges should also note that when they encounter foreign national minors who may have experienced human trafficking, federal law requires that courts ensure that the child's case is referred to the Office on Trafficking in Persons (OTIP) for assessment within 24 hours. HHS, REPORT TRAFFICKING CONCERNS AND REQUEST ASSISTANCE ON BEHALF OF A FOREIGN NATIONAL MINOR, <https://www.acf.hhs.gov/otip/victim-assistance/child-eligibility-letters/request-assistance>; see also, *National Judicial Network Peer-to-Peer Forum (November 7, 2023): Encountering Immigrant Child Trafficking Victims in Court: The Court's Role & Tips, Tools, and Steps Courts Can Take*, <https://niwaplibrary.wcl.american.edu/njn-encountering-child-trafficking-victims-in-court-nov-7-2023/>.

¹³ MODEL CODE OF JUDICIAL CONDUCT, (Am. Bar Ass'n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/; Jurisdictional Adoption of Revised Model Code for Judicial Conduct, (Am. Bar Ass'n), https://www.americanbar.org/groups/professional_responsibility/resources/judicial_ethics_regulation/map/ (last visited December 29, 2024).

¹⁴ This article will focus on judicial ethics board opinions. For a detailed discussion of judicial authority to sign U visa certifications, the legislative history of the U visa program, DHS's expertise on the U visa program, and an analysis of court cases that fail to fully understand U visa law, and court cases that are consistent with U visa law as set forth by DHS in its regulations, policies, and publications see, Kendall Niles, Veronica Thronson & Leslye Orloff, *Understanding the Judicial Role in U Visa Certification*, 31 Am. J. Fam. L. 208, (2018), <https://niwaplibrary.wcl.american.edu/pubs/understanding-u-visa-certification-by-judges/>.

Courts and judicial ethics boards are better able to issue opinions and decisions that reflect Congressional and DHS intent, by relying upon the expertise of and publications issued by DHS and USCIS for legally accurate information about immigration law.

Section III of this guidance document will then discuss the ABA Model Code of Judicial Ethics sections relevant to U visa certification by judges, as well as four Judicial Ethics Board opinions issued through 2024. The document will correct inaccuracies and misconceptions in these ethics opinions, provide legally accurate information on immigration law that is consistent with DHS and USCIS regulations, policy, and publications and will demonstrate when and how judges can ethically sign U visa certifications.

II. The U Visa – Overview, Myths, and Facts

A. Legislative History and Purpose

By providing protection against deportation and a path to possible legal immigration status for eligible immigrant crime victims, the U visa program is a powerful tool that increases access to justice by promoting detection of and encouraging reporting of criminal activities to courts, law enforcement, prosecutors, and state and federal government agencies.¹⁵

¹⁵ Once victims file for immigration relief and gain work authorization research finds a 114% increase in immigrant survivors' willingness to trust police and 36% of VAWA and U visa applicants continuing to make police reports regarding future crimes. See, Leslye E. Orloff, et al., Executive Summary – Transforming Lives: How the VAWA Self-Petition and the U Visa Change the Lives of Victims and Their Children After Work Authorization and Legal Immigration Status (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/executive-summary-final/> There is a 62% -70% increase in VAWA self-petitioners and U visa applicants seeking protection orders and custody and participating in criminal investigations and prosecutions. See, Krisztina E. Szabo et al., Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants (Feb. 12, 2014), https://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12; Rafaela Rodrigues et al., Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey (May 3, 2018), <https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report>.

The U visa helps U.S. justice system agencies build trust and fortify relationships with immigrant communities and can be effectively employed to lessen immigrant victims' fear of and increase trust in the courts, law enforcement, and prosecutors by demonstrating these agencies' commitment to serving, protecting, and providing access to justice for victims of crimes.¹⁶ These goals, which promote offender accountability in tandem with enhancing victim and community safety, were top of mind for Congress when it created the U visa program.¹⁷

Congress created the U visa in part because it found that immigrant women and children are especially vulnerable to certain crimes and forms of exploitation.¹⁸ This is due to several factors, including language barriers, isolation from family and friends, limited knowledge of U.S. laws, fear of deportation, and cultural differences.¹⁹ Immigrant victims may also be additionally harmed, or chilled from reporting, because of their immigration status. Perpetrators also weaponize their victim's immigration status to prevent them from reporting.

¹⁶ For more information about how language access and U visa certification by courts build trust and improve access to justice for immigrant and limited English proficient victims see, *National Center for State Courts White Paper: Improving the Courts' Capacity to Serve Limited English Proficient Persons Seeking Protection Orders* (2006), <https://niwaplibrary.wcl.american.edu/pubs/lang-gov-white-paper-improvingcourtscapacity-2006/>; see also, *Promoting Access to Justice for Immigrant Crime Victims and Children: Findings of a National Judicial Survey and Policy Recommendations* (National Center for State Courts, 2018) <https://niwaplibrary.wcl.american.edu/pubs/trends-in-state-courts-survey-findings/>.

¹⁷ 8 CFR § 214.14(a)(5); Rules and Regulations, 72 Federal Register 53019-20 (September 17, 2007), <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>; VAWA 2000, Pub. L. No. 106-386, § 1513(a)(2)(A); *DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015* at 20 <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>. See also, Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know*, at 1 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

¹⁸ VAWA 2000, Pub. L. No. 106-386, § 1513(a)(1)(A), <https://niwaplibrary.wcl.american.edu/pubs/vawa-ii-vawa/>; USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 4 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

¹⁹ *U Visa Law Enforcement Resource Guide* at ii (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>; *DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015* at 4 <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>.

Research has found that perpetrators of crimes against immigrant victims often attempt to report their victims to immigration enforcement authorities as a tactic to undermine criminal investigations, avoid criminal prosecution, and to gain leverage or advantage in civil, family, or criminal law cases.²⁰

To address this myriad of complex barriers, Congress and DHS designed U visa legislation²¹ and regulations²² to protect victims by enabling them to apply for U visa protections at the earliest stages of contact with the justice system, such as when victimization is revealed in a pleading, in a call to a government agency for help, in a police report, or in a conversation with law enforcement or prosecutors. Victims qualify for certification *as soon as* they demonstrate that they are or have been helpful to a certifying agency or official. These procedures reflect Congress's understanding of the unique challenges faced by immigrant victims.²³

²⁰ *DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015* at 20 <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/> (“It is common for perpetrators to report immigrant crime victims and witnesses to immigration enforcement officials to gain advantage in a civil or family law case and/or to avoid prosecution in a criminal case. Congress created the U visa as a tool to counter such efforts by perpetrators”); *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims* at p 36, https://niwaplibrary.wcl.american.edu/pubs/policechief_april-2018_building-trust-immigrant-victims/; *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* at 14-17, 48-51, 97-99, 102, 109 (May 3, 2018), <https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report/>; *Transforming Lives: How the VAWA Self-Petition and U Visa Change the Lives of Survivors and Their Children After Employment Authorization and Legal Immigration Status* at 4-57 (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/transforming-lives-final-report/>

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

²² 8 C.F.R. 214.14(a)(12).

²³ 72 Fed. Reg. 53019 (2007), “8 U.S.C. 1101(a)(15)(U)(i)(III). (“USCIS interprets ‘helpful’ to mean assisting ... authorities in the investigation or prosecution of the qualifying criminal activity of which he or she is a victim.”); see also, 72 Fed. Reg. Vol.

53019 (2007) (The requirement was written with several verb tenses, recognizing that an alien may apply for U nonimmigrant status at different stages of the investigation or prosecution. By allowing an individual to petition for U nonimmigrant status upon a showing that he or she may be helpful at some point in the future, USCIS believes that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation.”).

B. U Visa Basics

i. Who qualifies for a U visa? Applicants must:

1. Be a victim of a qualifying criminal activity;
2. Possess credible and reliable information about the criminal activity;
3. Have been *or* are currently being, *or* are likely to be helpful²⁴ to government officials in one of the following;²⁵
 - a. Detection, investigation, prosecution, conviction or sentencing of the criminal activity.
4. Have been a victim of criminal activity committed in the U.S. or that violated U.S. law;
5. Submit a U visa certification addressing 1-4 above signed by a judge, law enforcement, a prosecutor, or other government agency authorized to sign certifications;²⁶

Additionally, the victim must prove to DHS that:

6. The victim suffered substantial physical or mental abuse as a result of the criminal activity; and
7. The victim is admissible to the United States.²⁷

²⁴ 8 U.S.C. § 1101(a)(15)(U)(i)(III). (The statute authorizes certification for victims who may not have provided helpfulness in the past or present, but who are likely to be helpful in the future. However, judicial certifications are based only on information in court records or from court proceedings regarding the victim's past or present helpfulness).

²⁵ When a victim is under 16 years of age on the date the qualifying criminal activity occurred, or a victim is incapacitated or incompetent, a parent, guardian, or next friend¹⁸ may provide information on their behalf. See U.S.

DEP'T OF HOMELAND SEC., *U Visa Law Enforcement Resource Guide For Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies*, (2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

²⁶ 8 C.F.R. § 214.14(c)(2)(i); USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 2, 3, 10 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>; Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 1, 2, 4 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/> (Judicial certifications are based on detection, conviction or sentencing of a criminal activity. By signing the certification the judges is attesting that the immigrant is a victim of a qualifying criminal activity and the immigrant's helpfulness to the court or other government officials in the detection, investigation, prosecution, conviction or sentencing of the qualifying criminal activity).

²⁷ If the victim is not admissible, the victim may apply for an inadmissibility waiver from DHS as part of the U visa application. See INA § 245(m); 8 U.S.C. § 1255(m); 72 Fed. Reg. 53013.

ii. What are U visa qualifying criminal activities?

The U visa statute provides categories of U visa qualifying criminal activities. These categories are not specific crimes or citations to a criminal code.²⁸ Rather, to be a U visa qualifying crime, the criminal activity must involve on or more of the following *types* of criminal activities, in violation of local, state or federal law, or a substantially similar activity:²⁹

- Abduction
- Abusive Sexual Contact
- Blackmail
- Domestic Violence
- Extortion
- False Imprisonment
- Female Genital Mutilation
- Felonious Assault
- Fraud in Foreign Labor Contract (8 U.S.C. 1351)
- Hostage Taking
- 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
- Attempt, conspiracy or solicitation to commit any of these listed criminal activities³⁰

²⁸USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 4 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

²⁹ USCIS recognizes that there “are a wide variety of state criminal statutes in which criminal activity may be named differently than criminal activity found on the statutory list of qualifying criminal activities for the U visa, but the nature and elements of those activities are... substantially similar” to a U visa listed qualifying criminal activity. See, USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 5(February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

³⁰ See INA § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

U.S. Citizenship and Immigration Services (USCIS) has provided examples of similar criminal activities. For instance, hate crimes is considered a similar criminal activity by USCIS. Also child abuse and elder abuse may be classified as forms of domestic violence if the child, incapacitated adult, or elderly individual, meets the legal criteria for domestic violence under applicable statutes.³¹ In some states aggravated robbery may also be considered similar criminal activities.³²

Which government agencies are authorized to sign U visa certifications?

U visa certifications can be completed by any federal, state, tribal, territorial, or local judge, law enforcement, prosecutor, or other government agency that has the responsibility to detect, investigate, prosecute, convict or sentence in cases involving qualifying criminal activity. Agencies with criminal, civil, or administrative investigative jurisdiction, such as child and adult protective services, the Equal Employment Opportunity Commission, and federal and state Departments of Labor are also authorized by the U visa statute and regulations to be certifying agencies.³³

Any judicial official with delegated authority from a federal, state, local, tribal or territorial court to decide cases is authorized by the federal U visa statute and regulations to sign U visa certifications.³⁴ All judges have the authority to sign U visa certifications including but not limited to: administrative law judges, commissioners, magistrates, aldermen, judicial referees, surrogates, masters, and chancellors.³⁵

³¹ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 4 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>

³² USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 5 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>

³³ DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015 at 6, <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>

³⁴ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 16 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>

³⁵ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 16 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>

Judges play a vital role in promoting access to justice and protecting the integrity of the justice system. For this reason, in the Violence Against Women Act of 2000, Congress specifically listed judges as government officials authorized to sign U visa certifications. Judges detect criminal activities and encounter victims of criminal activities in court in a wide range of criminal, civil, family, and child welfare cases. Judges were included among the government agency personnel authorized to certify U visas because judges have expertise in and regularly hear civil, family, and criminal court cases that involve domestic violence, sexual assault, stalking, child abuse, and human trafficking, all of which account for 58% of all U visa cases filed nationally.³⁶

iii. What protections do victims filing U visas receive?

U visa applicants receive some protections at each stage of the U visa process, beginning with certification and application. Once victims receive a U visa certification and submit their applications, even before any further adjudication is performed, they receive some protection from deportation through VAWA Confidentiality laws, which prevents ICE from taking any enforcement action against them based on information provided by a perpetrator. This vital notification function prevents perpetrators from attempting to halt investigations and prosecutions by having their victims deported.³⁷ Victims receive additional protections and may be eligible for some services once they receive a bona fide determination, on average 3-5 years after filing their application.³⁸ Victims must then wait in line for final adjudication of their U visa applications until a U visa becomes available, a wait of up to 15 years.³⁹

³⁶ USCIS, U VISA REPORT, TRENDS IN U VISA LAW ENFORCEMENT CERTIFICATIONS, QUALIFYING CRIMES, AND EVIDENCE OF HELPFULNESS (July 2020), https://niwaplibrary.wcl.american.edu/pubs/u_visa_lea-certs-report/.

³⁷ *Bench Card on Violence Against Women Act (VAWA) Confidentiality* (December 3, 2021), <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-va-wa-confidentiality/>; *VAWA Confidentiality Statutes, Legislative History and Implementing Policy* (Updated June 7, 2022), <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history/>.

³⁸ USCIS, POLICY MANUAL, VOLUME 3 HUMANITARIAN PROTECTION AND PAROLE, PART C VICTIMS OF CRIME, CHAPTER 5 BONA FIDE DETERMINATION PROCESS, <https://www.uscis.gov/policy-manual/volume-3-part-c-chapter-5>. It is at receipt of work authorization and deferred action that victims lives begin to stabilize and many aspects of victim's and their children's lives improve. See generally, *Executive Summary – Transforming Lives: How the VAWA Self-Petition and the U Visa Change the Lives of Victims and Their Children After Work Authorization and Legal Immigration Status* (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/executive-summary-final/>.

³⁹ *Form I-918, Petition for U Nonimmigrant Status, by Fiscal Year, Quarter, and Case Status and Form I-918, Petition for U Nonimmigrant Status, Bona Fide Determination Review (Fiscal Year 2024, Quarter 4)*, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.uscis.gov%2Fsites%2Fdefault%2Ffiles%2Fdocument%2Fdata%2Fi918u_visastatistics_fy2024_q4.xlsx&wdOrigin=BROWSELINK.

iv. What is the victim's ongoing cooperation requirement and its exceptions?

Throughout the process, the victim has an ongoing obligation to cooperate, assist, or not unreasonably refuse to provide cooperation or assistance in an investigation or prosecution related to the qualifying criminal activities when reasonably requested by certifying officials if there is an ongoing need.⁴⁰ A crucial exception exists for situations when ongoing cooperation would be unreasonable, including (but not limited to) situations when the victim fears retaliation or harm by the perpetrator.

The regulations governing U visa victim applications for lawful permanent residency articulate how USCIS adjudicators and U visa certifiers should assess whether a victim's refusal to cooperate was unreasonable based on affirmative evidence and the totality of the circumstances in the victim's case.⁴¹ DHS Directives also require that DHS employees making this determination take a victim-centered approach that "[e]qually values identification and stabilization of victims, and the detection, investigation, and prosecution of perpetrators of abuse, exploitation and violence."⁴² Many victims continue to cooperate over time, especially after receiving work authorization and deferred action, which can provide them with a sense of security and stability.⁴³

⁴⁰USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 2, 8 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁴¹ 8 C.F.R. § 245.24(a)(5); 73 Fed. Reg. / 75547 (December 12, 2008) (Factors considered include "general law enforcement, prosecutorial, and judicial practices; the kinds of assistance asked of other victims of crimes involving an element of force, coercion, or fraud; the nature of the request to the alien for assistance; the nature of the victimization; the applicable guidelines for victim and witness assistance; and the specific circumstances of the applicant, including fear, severe trauma (either mental or physical), and the age and maturity of the applicant").

⁴² DHS DIRECTIVE 002-03: PREVENTING AND ADDRESSING GENDER-BASED VIOLENCE THROUGH A VICTIM CENTERED APPROACH at 4 (November 1, 2023), https://niwaplibrary.wcl.american.edu/pubs/24_0521-dhs-gbv-directive/.

⁴³ Krisztina E. Szabo et al., *Early Access to Work Authorization For VAWA Self-Petitioners and U Visa Applicants* (Feb. 12, 2014), https://niwaplibrary.wcl.american.edu/pubs/final_report-on-early-access-to-ead_02-12/; Rafaela Rodrigues et al. *Promoting Access to Justice for Immigrant and Limited English Proficient Crime Victims in an Age of Increased Immigration Enforcement: Initial Report from a 2017 National Survey* (May 3, 2018), <https://niwaplibrary.wcl.american.edu/pubs/immigrant-access-to-justice-national-report/>; Leslye Orloff, et. al., *U Visa Victims and Lawful Permanent Residency* at 5 (September 6, 2012) <https://niwaplibrary.wcl.american.edu/pubs/pb-tkit-uvisalawfulpermanentresidency-9-6-12/> (70% continued cooperation and 29% victims were willing to cooperate if their criminal case went forward).

C. U Visa Myths and Facts

i. Is the U visa a preferential status under immigration law?⁴⁴

No. There are three major routes to legal immigration status in the United States that are all co-equal legitimate pathways to lawful permanent residency and ultimately citizenship. These are family sponsorship, employer sponsorship, and humanitarian relief. Each are separate paths with none treated as a preferential status. The humanitarian relief path to lawful permanent residency is available to refugees, asylees and victims of qualifying crimes including domestic violence, sexual assault, child abuse, stalking, and human trafficking. This path is also available to children who have suffered child abuse, abandonment, or neglect perpetrated by their parent.⁴⁵

ii. Does a judge or other certifying official grant a U visa to a victim by signing a U visa certification?

No. The U visa certification (Form I-918B) is a required piece of evidence that victims must submit as part of their U visa application.⁴⁶ It is an application requirement, and applications filed without certifications will be rejected as incomplete.⁴⁷ The signed U visa certification does not change a victim's legal immigration status⁴⁸ or guarantee that the victim's U visa application will be granted.⁴⁹

⁴⁴ *Formal Advisory Opinion: 2014-03* (N.C. Jud. Standards Comm'n Aug. 8, 2014)

⁴⁵ USCIS, HUMANITARIAN, <https://www.uscis.gov/humanitarian>.

⁴⁶ New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53023 (Sept. 17, 2007), <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>.

⁴⁷ 8 C.F.R. § 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.").

⁴⁸ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 1 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

⁴⁹ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3, 11 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

The certifying agency *is not responsible* for determining whether a victim is eligible for immigration status under the U visa program.⁵⁰ USCIS has sole responsibility for adjudicating all U visa applications⁵¹ and adjudicating U visa recipients' applications for lawful permanent residency.⁵²

iii. *In order to sign a certification, does a certifier have to determine whether a victim will provide future helpfulness in addition to the past or present helpfulness the victim has already provided?*

No. Judges may sign U visa certifications as soon as they are able to assess the victim's current or past helpfulness to the court in detecting the criminal activity the victim suffered. When judges sign a certification based on a victim helping the court detect criminal activity that they or their child suffered, the certification is based on helpfulness the victim has already provided. This can include helping the court detect through pleadings, testimony, participation at hearings, or evidence submitted (e.g., medical records, police reports).

It is important for judges to remember that only one of the statutorily listed forms of helpfulness is required to support U visa certification.⁵³ The victim must have provided helpfulness in the past, *OR* they are currently being helpful, *OR* if they have not provided past or present helpfulness the certifier believes that are likely to be helpful in the future. When the victim has already provided past or present helpfulness, this is sufficient for the certifier to sign the U visa certification. The certifying judge or judicial officer does not *and should not* base certification on what the victim may do in the future. As will be discussed in Section III of this article, judicial U visa certifications based on past or present helpfulness observed by the judge or documented in court records is a best practice that is consistent with judicial ethical obligations.

⁵⁰ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 10 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁵¹ *DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015* at 8, 20, <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>.

⁵² See generally, 8 C.F.R. § 245.24.

⁵³ 72 Fed. Reg. 53019 (2007); Sylvie Sheng et al., *U Visa Certification and T Visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers* at 46-47 (2021),

iv. Can judges **only** sign U visa certifications for victims who were helpful in **criminal investigations and criminal prosecutions**?

No. The U visa statute lists judges as certifiers.⁵⁴ This means that they can certify based on any kind of helpfulness permitted by DHS regulations, policies, and guidance. DHS regulations, policies, and guidance confirm that the term "investigation or prosecution" in the statute is broadly interpreted under federal immigration law regulations to always include helpfulness in the detection of criminal activities in **any** type of court case. It also includes helpfulness in conviction or sentencing in criminal cases.⁵⁵ DHS recognizes that judges will base certification on a victim's helpfulness in the detection of criminal activity in family,⁵⁶ civil or criminal cases,⁵⁷ or in the conviction or sentencing of perpetrators in criminal cases because "[j]udges neither investigate crimes nor prosecute perpetrators."⁵⁸

It is especially important for judges to understand the full scope of their certifying authority, because there are many instances where the judge may be the only certifying official in a position to assess the victim's helpfulness because the victim's only contact with the justice system has been at court.⁵⁹ This commonly occurs in situations involving protection orders, custody, and divorce cases where the victim provides evidence to the court about their own or their child's victimization.

⁵⁴ 8 U.S.C. § 1101(a)(15)(U)(i)(III); See also, New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status: Interim Rule, 72 Fed. Reg. 53013, 53020 (Sept. 17, 2007) <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>.

⁵⁵ 8 C.F.R. § 214.14(a)(5); New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53023 (Sept. 17, 2007), <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>.

⁵⁶ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15.13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 2-3 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

⁵⁷ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁵⁸ New Classification for Victims of Criminal Activity: Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53020 (Sept. 17, 2007) <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>.

⁵⁹ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15.13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 2-3 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

⁶⁰ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15.13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 2-3 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/> (Including recommending that judges make available at courthouses DHS know your rights brochures on immigration protections for victims of crime and abuse <https://www.uscis.gov/humanitarian/victims-of-human-trafficking-and-other-crimes/resources-for-victims-of-human-trafficking-and-other-crimes>); SYLVIE SHENG ET AL., *U Visa Certification and T Visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers* at 10(2021),

For instance, victims may have revealed sexual assault to a court when seeking a sexual assault protection order or in a civil employment case against an abusive employer. Common scenarios also include cases where a child victim or their parent provides helpfulness to the court in detecting criminal activity by providing information about child abuse to the court in a child welfare proceeding.

In some jurisdictions victims will also turn to the courts for certification, because the court is the only justice system agency that provides qualified interpreters needed for Limited English Proficient (LEP) victims to report crime victimization.⁶⁰

Judges assess the helpfulness of a victim using the same standard the judge uses in making probable cause determinations. DHS advises certifiers that certification be granted based upon “any credible evidence” which is parallel to probable cause.⁶¹

No statute of limitations: The U visa statute,⁶² and USCIS U visa regulations and policies do not impose a statute of limitations or signing a U visa certification.⁶³ According to DHS and USICS:

“There is no statute of limitations on signing the certification – one can be signed for a crime that happened many years ago or recently.”⁶⁴

“The key is the victim’s helpfulness, not the timing of the helpfulness.”⁶⁵

⁶¹ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 4 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-u-visa-judicial-training-update/>.

⁶² 8 U.S.C. § 1101(a)(15)(U); 8 U.S.C. § 1184(p).

⁶³ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES (February 28, 2022) at 8 <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>;

⁶⁴ *DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015* at 7, 19 <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/> (“There is no statute of limitations regarding the time frame in which the criminal activity must have occurred. Federal legislation specifically provides that a victim may be eligible for a U visa based on having been helpful in the past to the detection, investigation, prosecution, conviction, or sentencing of criminal activity. A crime victim may be eligible to receive U visa certification when, for example, the case is closed because the perpetrator could not be identified; a warrant was issued for the perpetrator but no arrest could be made due to the perpetrator fleeing the jurisdiction or fleeing the United States, or has been deported; before or after the case has been referred to prosecutors, as well as before or after trial and whether or not the prosecution resulted in a conviction. . A trafficking victim could be eligible to receive a T visa declaration when a case is closed for similar reasons. The petitioner must still meet all the eligibility requirements for a U or T visa to be approved”).

⁶⁵ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 8 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

A judge detects crime victimization and helpfulness to the courts when the judge observes or receives evidence of helpfulness including but not limited to when the victim.⁶⁶

- Provided information about or evidence of domestic violence, child abuse, elder abuse, sexual assault, stalking, human trafficking, or other U visa criminal activity in a custody, divorce, paternity, child support or other family court action, including but not limited discussing victimization in pleadings, providing testimony, photographs of injuries, or medical records;
- Provided information regarding child or elder abuse to protective services agency staff or investigators;
- Filed for and was granted a civil protection order;
- Sought or received a temporary, interim, or ex parte protection order;
- Testified in a default or contested protection order proceeding;
- Testified or provided evidence about the victim or their child's victimization in a custody, child welfare, or other family court proceeding;
- Brought their abused children to court to participate in child welfare or criminal proceedings regarding abuse of their child;
- Called police to report the crime;
- Testified at or attended pre-trial motions hearings or status hearings in a civil, family or criminal proceeding;
- Testified at or attended a criminal trial;
- Provided a statement to police, even if there was no arrest;
- Participated in a criminal investigation;
- Identified the perpetrator at line up;
- Testified before a grand jury or at a criminal trial; or
- Provided a victim statement at sentencing

v. *Does issuance of a U Visa by USCIS or the victim's ability to obtain a U visa certification require or contemplate a **past, present, or future criminal investigation or criminal prosecution?***

No. Any victim who provides information to a government agency that is helpful in detecting criminal activity is eligible for certification. No criminal investigation or prosecution is required or need be initiated either before certification or ever in the future.⁶⁷ There are a wide range of civil, family and child welfare contexts⁶⁸ where an immigrant victim helps with the detection of criminal activity committed against themselves or their child.

U visa certification is authorized by both the U visa statute⁶⁹ and regulations⁷⁰ which recognize detection as sufficient grounds for issuance of U visa certifications.

The U visa program was designed to promote access to justice in civil, child welfare, adult protection, administrative law, and criminal cases. By the time the U visa was created in 2000, offering crime victims a civil remedy and assistance unrelated to whether or not a criminal case had or would ever be initiated⁷¹ was well established in domestic violence protection order statutes, in early sexual assault protection order statutes, in adult and child protective services cases, and in the work of the Equal Employment Opportunity Commission (EEOC) and the U.S. Department of Labor.

⁶⁶ See more Peter Helein et al., *U-Visa: "Helpfulness" Checklist*, (2019), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-helpfulness-checklist/>.

⁶⁷ USCIS, U Visa LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 8,10 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁶⁸ USCIS, U Visa LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3, 6 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁶⁹ VAWA 2000, Pub. L. No. 106-386, §1513(a)(2)(A).

⁷⁰ 72 Federal Register 53020 (September 17, 2007)

("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... 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 Guidelines.").

⁷¹ USCIS, U Visa LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/> ("The initiation of a criminal case is not required to establish eligibility for a U visa.").

The U visa statute⁷² and regulations⁷³ were designed to ensure that access to justice offered by courts and the work of state and federal agencies would be enhanced because U visa certification could be based upon detection of criminal activity in a wide range of non-criminal law cases. Under federal U visa laws, the following are examples of U visa certification authorized based on detection of criminal activity. Examples include:

- Victims providing courts information about domestic violence, child abuse, elder abuse, sexual assault, stalking, or human trafficking in a civil protection order, custody, divorce, or child welfare case through pleadings testimony, motions, or court appearances.
- Victims helping the EEOC, DOL, and/or state departments of labor detect sexual assault, felonious assault, domestic violence, extortion, and other U visa criminal activities in the course of labor violations and discrimination investigations.
- State child and elder abuse protection staff regularly working with victims who help with detection of U visa criminal activities including child abuse, elder abuse, sexual assault, and unlawful criminal restraint during abuse related investigations.

USCIS and DHS confirm that a criminal investigation or criminal prosecution is not required in the past, present, or future for a victim who has provided helpfulness in the detection, or investigation, or prosecution, or conviction, or sentencing to receive U visa certification.

“The initiation or progress on a investigation or prosecution is outside of the victim’s control.”⁷⁴ DHS and USCIS documents state that the following are not required:⁷⁵

⁷² 8 U.S.C. § 1101(a)(15)(U)(i)(III).

⁷³ 8 C.F.R. § 214.14(a)(2).

⁷⁴ USCIS, U Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies at 8 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁷⁵ USCIS, U Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies at iii, 6, 8, 13 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>; DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015 at 7, 15, 19, 21 <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>; Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 4 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-u-visa-judicial-training-update/>.

- An active criminal investigation or prosecution;
- That a criminal case was opened or has been closed.
- Filing of criminal charges;
- That the offender can be identified or located;
- An arrest;
- A prosecution;
- A conviction;
- A plea;
- Initiation of a criminal case either an investigation or prosecution;
- That a grand jury issued an indictment;
- That an investigation or prosecution of a crime is initiated or completed after a victim reports the crime; or
- That the agency that detected the criminal activity is the agency with the authority to decide whether or not to pursue a criminal investigation or criminal prosecution.

vi. Does the judge who signs the U visa certification have to be the judge who presided over the case in which the victim provided helpfulness?

No. Any judge can sign a U visa certification who has observed or is able to obtain from court records information needed to complete the certification form about the criminal activity that was perpetrated against the victim or the victim's child and about helpfulness to the court, police, prosecutors, child welfare, labor enforcement agencies, or other government official in the detection, investigation, prosecution, conviction or sentencing related to the criminal activity.

According to USCIS:

“Judges may sign certifications based on a review of court records involving the victim. A judge may sign the certification based on having conducted the sentencing in a criminal case. A judge may also sign based on having detected a qualifying crime during a proceeding (criminal or civil) over which they presided.”⁷⁶

⁷⁶ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

III. Potential Ethics Implications

This section of the article reviews four judicial ethics opinions from three states issued prior to December 2024. These opinions are:

- Maryland Judicial Ethics Committee, Opinion 2024-24 – Judges Signing of Federal U Visa Certifications – Supplemental Opinion (October 17, 2024).⁷⁷
- Maryland Judicial Ethics Committee, Opinion 2023-20 – Judges Signing of Federal U Visa Certifications (August 21, 2023).⁷⁸
- Minnesota Board on Judicial Standards, Opinion 2015-2 – U-Visa Certifications (June 26, 2015).⁷⁹
 - National Judicial Training Update 15-13, Immigrant Crime Victims & U- Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know (July 8, 2015).⁸⁰
 - Minnesota, Judicial Training & Education Update, 15-13. Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know (July 8, 2015).⁸¹
- Judicial Standards Commission State of North Carolina, Formal Advisory Opinion 2014-03 (August 8, 2024).⁸²

⁷⁷ Maryland Judicial Ethics Committee Opinion 2024-24 Judges' Signing of Federal U visa Certifications – Supplemental Opinion (October 17, 2024) <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u-visa/>.

⁷⁸ Maryland Judicial Ethics Committee Opinion 2023-20 Judges' Signing of Federal U visa Certifications (August 21, 2023) <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

⁷⁹ Minnesota Board of Judicial Standards Advisory Opinion 2015-2 U Visa Certification by Judges (June 26, 2015) <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

⁸⁰ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

⁸¹ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *Minnesota Judicial Training & Education Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/minnesota-uvisa-judicial-training-update/>.

⁸² Judicial Standards Commission State of North Carolina, *Formal Advisory Opinion 2014-03* (August 8, 2024) <https://niwaplibrary.wcl.american.edu/pubs/nc-u-visa-judicial-ethics-advisory-opinion-2014-03/>. The Minnesota Board on Judicial Standards noted that the North Carolina opinion has two significant limitations with regard to its usefulness to judges and Judicial Ethics Boards in other states. "First, the opinion is based on 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)... Second, the North Carolina opinion directly analyzes only pre-conviction of an I-918B form [U visa certification] that does not discuss the possibility that a judge may certify... after conviction" Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 4 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

This review is divided into sections organized by topics addressed in the ABA Model Code of Judicial Conduct Rules.⁸³ It includes an analysis of each opinion in relation to the following relevant topics. The guidance document will then consider key issues for U visa certification with respect to the rules identified:

- Identify judicial ethics rules that are not implicated when judges sign U visa certifications.
- Demonstrate the extent to which, if at all, and where in the judicial ethics opinions they include and apply information about immigration laws that is not consistent with U visa statutes and DHS regulations, policies and publications on the U visa.
- Discuss where the judicial ethics opinions make assumptions about federal immigration laws with regard to U visa certification and the requirements of the U visa program that are inconsistent with U visa statute and the DHS regulations, policies, and publications that lead to faulty judicial ethics conclusions in these opinions.

A. ABA Model Code of Judicial Conduct Rules 3.1 and 1.3 – Signing a U Visa Certification is a Judicial Act and Not an Extra-Judicial Activity and Does Not Lend the Prestige of the Judge’s Office to The Victim Seeking Certification

Rules 3.1 and 1.3 consider judges engagement in extrajudicial activities and prestige seeking activities, respectively. As this section will articulate, signing a U visa certification is a judicial, rather than extra judicial activity, and does not lend prestige of the judge’s office to the victim seeking certification. Neither of these rules is implicated in U visa certification by judges. Indeed, judges are Congressionally authorized to certify U visas.

⁸³ This article uses as reference the ABA Model Code of Judicial Conduct (2020 Edition)
https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/.

i. Text of relevant rules

- Rule 3.1: Extrajudicial Activities in General:
 - “A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:
 - (A) participate in activities that will interfere with the proper performance of the judge’s judicial duties;
 - (B) participate in activities that will lead to frequent disqualification of the judge;
 - (C) participate in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality;
 - (D) engage in conduct that would appear to a reasonable person to be coercive; or
 - (E) make use of court premises, staff, stationery, equipment, or other resources, except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law.”⁸⁴
- Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office:

“A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.”⁸⁵

⁸⁴ MODEL CODE OF JUDICIAL CONDUCT, Rule 3.1: Extrajudicial Activities in General (Am. Bar Ass’n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_1extrajudicialactivitiesingeneral/.

⁸⁵ MODEL CODE OF JUDICIAL CONDUCT, Rule 1.3: Avoiding Abuse of the Prestige of Judicial Office (Am. Bar Ass’n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcj_c_canon_1/rule1_3avoidingabuseoftheprestigeofthejudicialoffice/.

ii. *Signing a U visa certification is a judicial act, not an extra-judicial activity*

The Maryland Judicial Ethics Committee concluded that signing of a U visa certification is a judicial act and is not an extrajudicial activity. The Maryland Judicial Ethics Committee concluded that completing a U visa certification

“is a judicial act because it is an action taken by a judge in the judge’s official capacity and in connection with some proceeding within the court’s jurisdiction.”⁸⁶

It is an official act, not an extra-judicial activity and is therefore not governed by Rule 3.1.⁸⁷

iii. *Certification can be made by a certifying judge, the court’s presiding or administrative judge, or the judge who presided over the proceedings involving the victim*

The Minnesota Board on Judicial Standards concurs generally that a judge in a criminal or civil case that has been completed can ethically sign U visa certifications so long as they have an adequate basis to make the averments called for in the certification.⁸⁸ The Maryland Judicial Ethics Commission states that judges may sign U visa certifications when the conclusions necessary for the U visa certification can be made based on completed court proceedings.⁸⁹

⁸⁶ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges’ Signing of Federal U visa Certifications* at 6 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>; Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges’ Signing of Federal U visa Certifications – Supplemental Opinion* at 5 (October 17, 2024), <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u-visa/>.

⁸⁷ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges’ Signing of Federal U visa Certifications* at 7 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

⁸⁸ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6-7, (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/> (This opinion is not fully consistent with the U visa regulations which recognize that judicial certifications are not limited to conviction and sentencing. The U visa regulations and the regulatory history both include of detection as a grounds for certification, particularly as it is related to certification by judges.). See, 72 Fed. Reg. 53020 (September 17, 2007), <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>; 8 C.F.R. § 214.14(a)(5); and Section II of this article.

⁸⁹ Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges’ Signing of Federal U visa Certifications – Supplemental Opinion* at 6 (October 17, 2024), <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u-visa/>.

USCIS accepts certifications signed by judges including “certifications signed by judges who were not assigned the case when the judge has knowledge of the case by reviewing the record or consulting with the judge who heard the case.”⁹⁰ USCIS, in its 2022 resource guide for certifiers confirms:

“Judges may sign certifications based on a review of court records involving the victim. A judge may sign the certification based on having conducted the sentencing in a criminal case. A judge may also sign based on having detected a qualifying crime during a proceeding (criminal or civil) over which they presided.”⁹¹

The facts needed for certification about crime victimization and the victim’s helpfulness⁹² can be obtained by a certifying judge from a wide range of court records including judicial findings, pleadings, motions, settlement agreements, notes in the court record made by the presiding judge, and evidence submitted in the case.

In *Matter of Rosales*, the judge who issued the U visa certification was not the same judge who presided over the victim’s protection order case, as the original judge had retired. To assess the applicant’s eligibility for certification, the certifying judge carefully reviewed the hearing transcripts, the court’s file, and the family offense petition.⁹³ The certifying judge was able to rely on the enumerated acts outlined in the family offense petition to complete the certification.⁹⁴

⁹⁰ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *Minnesota Judicial Training & Education Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 5 (July 8, 2015),

<https://niwaplibrary.wcl.american.edu/pubs/minnesota-uvisa-judicial-training-update/>. (Includes a note from Judge Alan Pendelton’s 2015 interview with USCIS subject matter experts from the USCIS Office on Policy and Strategy).

⁹¹ *U Visa Law Enforcement Resource Guide* at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

⁹² For a list of examples of a victim’s helpfulness see Section II(C)(iv).

⁹³ *In re Rosales*, 40 Misc. 3d 1216(A) (N.Y. Fam. Ct. 2013).

⁹⁴ *In re Rosales*, 40 Misc. 3d 1216(A) (N.Y. Fam. Ct. 2013).

In a number of courts across the country, all certification requests are assigned to a certifier judge or the presiding judge. Judges hearing cases forward all U-visa certification requests to the Certifier Judge who develops expertise on U visa certification. According to the Superior Court of California, “this approach helps ensure uniformity of decision and a clear transparent process for the applicant.”⁹⁵ This approach, like that adopted by the *Matter of Rosales* court, which is consistent with USCIS practice and guidance, facilitates access to certification by judges.⁹⁶

The Minnesota Board on Judicial Standards also recognizes that “[t]here may be unusual circumstances in which such a certification could be proper, e.g., when the prosecutor is unavailable to sign the certification, there has been a conviction, and the presiding judge is incapacitated.”⁹⁷ Other examples of when certification by a judge who did not hear the victim’s can appropriately sign U visa certifications based on court records include: when judges are rotated to a new calendar, judges have switched dockets, have taken extended leave, or are part of a circuit rotation. Having a certifier judge or presiding judge certify also reduces the need for recusal since the judge hearing the case is not the judge signing the U visa certification.

⁹⁵ Superior Court of California, *U-Visa Certification Protocol* at 1 (2022), <https://niwaplibrary.wcl.american.edu/pubs/san-francisco-court-civil-division-u-visa-certification-protocol> (last visited Dec 10, 2024).

⁹⁶ When a presiding judge or certifier judge handles U visa certifications for the court this facilitates early access to U visa certification including for victims who are granted ex parte protection orders. When the judge issuing ex parte protection orders receives information of a victim’s helpfulness the court can sign a U visa certification. That might include helpfulness to police evidence by a copy of a police report that the victim provided to the judge as part of the ex parte protection order request. The judge who issues that ex parte protection order can issue a judicial U visa certification based on the information they detected about the crime victimization and the victim’s helpfulness. When the judge issuing the ex parte protection order will not be the judge hearing the protection order case judicial ethical rules are not implicated. See Sections III(A)(iii), III(B)(vi), and III(E)(iii) for more information.

⁹⁷ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 8 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

iv. *U visa certification by a judge does not abuse the prestige of judicial office.*

The ABA Judicial Code of Conduct Rule 1.3 Avoiding Abuse of the Prestige of Judicial Office states that “A judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so.” The Maryland Judicial Ethics Commission⁹⁸ correctly held that completing a U visa certification on the basis of completed proceedings does not amount to a judge lending the prestige of their judicial office to a person in violation of the rule. The act of signing a U visa certification advances the interests of the immigrant victim who requests the certification; however, this is no different than a judge deciding an issue in a case on the merits in favor of a litigant.⁹⁹

The Minnesota Board on Judicial Standards¹⁰⁰ came to the same conclusion holding that although a certification advances an immigrant’s interests, the Board does not believe that certification involves the “prestige” of judicial office. It also correctly notes federal regulations contemplate that a judge may sign a U visa certification¹⁰¹ and federal courts¹⁰² have recognized certifications by judges are authorized by the U visa statute.¹⁰³ There is no abuse of the prestige of a judge’s office involved when the law and the courts countenance judicial certifications.

⁹⁸ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges’ Signing of Federal U visa Certifications* at 7 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>; Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges’ Signing of Federal U visa Certifications – Supplemental Opinion* at 5 (October 17, 2024), <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u-visa/>.

⁹⁹ North Carolina and Maryland both have Judicial Ethics Codes that use the terminology “lend” instead of the Model Code’s and Minnesota’s “abuse”. However, Minnesota and Maryland reached the same conclusion that Rule 1.3 is not implicated. North Carolina did not address this rule in its opinion. Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 4 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹⁰⁰ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 4 (June 26, 2015) <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹⁰¹ 8 C.F.R. § 214.14(c)(4).

¹⁰² See generally, Kendall Niles, Veronica Thronson & Leslye Orloff, *Understanding the Judicial Role in U Visa Certification*, 31 Am. J. OF Fam. L. 208, 225 (2018); <https://niwaplibrary.wcl.american.edu/pubs/understanding-u-visa-certification-by-judges/>

¹⁰³ 8 U.S.C. § 1184(p)(1).

B. ABA Model Code of Judicial Conduct Rules 2.2, 1.2, 2.7, and 2.11(A)(6)(d) – Judicial Approaches to U Visa Certification that Maintain Judicial Impartiality

In analyzing the judicial ethics boards' opinions regarding how the ABA Model Code of Judicial Conduct Code Rules 2.2, 1.3, 2.7 and 211(A)(6)(d) apply to U visa certifications by state court judges, it is important to first address how the incorrect assumptions and legal misunderstandings about federal U visa immigration law discussed above in the U visa Myths and Facts Sections II (C) (iii), (iv) and (v), may have influenced each of the Judicial Ethics Committees' opinions on ABA Model Code Rules 2.2, 1.2, 2.7, and 2.11 (A)(6)(d):

i. Text of Relevant Rules

- 2.2 Impartiality and Fairness: "A judge shall uphold and apply the law, and shall perform the duties of judicial office impartially and fairly."¹⁰⁴
- 1.2 Promoting Confidence in the Judiciary: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."¹⁰⁵
- Rule 2.7: Responsibility to Decide: "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law."¹⁰⁶

¹⁰⁴MODEL CODE OF JUDICIAL CONDUCT, r. 2.2 (Am. Bar Ass'n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/.

¹⁰⁵MODEL CODE OF JUDICIAL CONDUCT, r. 1.2 (Am. Bar Ass'n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/mcjc_canon_1/rule1_2promotingconfidenceinthejudiciary/.

¹⁰⁶MODEL CODE OF JUDICIAL CONDUCT, r. 2.7 (Am. Bar Ass'n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_7responsibilitytodecide/.

- Rule 2.11(A)(6)(d): Disqualification: “A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances...
 - “(6) The judge: ... (d) previously presided as a judge over the matter in another court.”¹⁰⁷

ii. A criminal investigation or prosecution need never be initiated

The Judicial Ethics Boards opinions in all three states reviewed for this article focused on the issues of avoiding the appearance of impropriety and promoting public confidence all assume that under U.S. immigration laws U visa certification always requires that there be a criminal court case in the past or currently open or impending. The opinions appear to anticipate that there must be a future criminal investigation or prosecution. As discussed in detail in sections C(iv) and C(v) above, *this is incorrect*.

U visa certifications can be issued in civil cases without any requirement that either a criminal investigation or a criminal prosecution will ever be initiated.¹⁰⁸ Judicial certification can be based solely on an immigrant crime victim’s past or present helpfulness to the court in a civil, family, or child welfare case including when there has never been and may never be any criminal case involving the victim.

The North Carolina ethics opinion errs by narrowly viewing U visa certification by judges from only one vantage point and thus assuming that judicial certifications are only made pre-trial in pending cases. In doing so the North Carolina opinion fails to recognize that when judges sign certifications, after a court case involving the victim has been completed, judicial ethics codes are not implicated. Whereas judicial ethics codes could be implicated when a judge signs a U visa certification in a pending case over which the judge is presiding.

¹⁰⁷MODEL CODE OF JUDICIAL CONDUCT, r. 2.11 (Am. Bar Ass’n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification/.

¹⁰⁸ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 8, 10(February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/> (“The initiation of a criminal case is not required to establish eligibility for a U visa.”).

The Maryland Judicial Ethics Committee's Opinion 2024-24 provides an incomplete reading of the federal U visa regulations. The opinion correctly notes that: "Maintaining the independent judicial role promotes compliance with the bedrock impartiality principles" of judicial ethics rules.¹⁰⁹ This Maryland opinion also correctly cites the federal law from the federal U visa regulations¹¹⁰ and regulatory history¹¹¹ that explicitly recognizes that judges sign certification based on "detection," "conviction," or "sentencing" because judges "neither investigate crimes nor prosecute perpetrators."¹¹² However, the Maryland opinion inexplicably ignores "detection" as a basis for certification in the regulation.¹¹³ Further, the opinion assumes that judges only certify based on helpfulness "in the prosecution of criminal conduct,"¹¹⁴ a view with which DHS and USCIS disagree.¹¹⁵

¹⁰⁹ Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges' Signing of Federal U visa Certifications – Supplemental Opinion* at 4 (October 17, 2024) <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u- visa/>.

¹¹⁰ 8 C.F.R. § 214.14(a)(5).

¹¹¹ 8 CFR § 214.14(a)(5); 72 Fed. Reg. 53020 (September 17, 2007) <https://niwaplibrary.wcl.american.edu/pubs/uvisarule/>.

¹¹² 72 Fed. Reg. 52,020 (Sept 17, 2007).

¹¹³ 8 C.F.R. § 214.14(a)(5).

¹¹⁴ Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges' Signing of Federal U visa Certifications – Supplemental Opinion* at 5 (October 17, 2024), <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u- visa/>.

¹¹⁵ U Visa Law Enforcement Resource Guide at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa- certification-resource-guide-2022/> ("A judge may also sign based on having detected a qualifying crime during a proceeding (criminal or civil) over which they presided.");

DHS U and T Visa Law Enforcement Resource Guide Updated November 30, 2015 at 19 (Certifiers -- "may sign a certification regardless of the outcome of the qualifying criminal case, including in the following instances:

- 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 or not the plea was to an offense that is a qualifying criminal activity; and
- the defendant was found not guilty.")

iii. Impartiality – certification in open and closed cases differ

Whether U visa certification impairs a judge's impartiality turns on whether the judge is being asked to sign a U visa certification in an open case or in a case that has already been concluded. All three Judicial Ethics Boards essentially concur that signing a U visa certification in proceedings that have not been completed based upon "partial or nonexistent record risks impairing the judge's impartiality."¹¹⁶

The Maryland Committee noted that "The judge's conclusions that criminal conduct has been committed and that the requesting party is the victim may be viewed as pre-judging issues that have not yet been resolved with the presentation of all evidence in an adversarial process. The judge may be perceived as crossing over into the law enforcement or prosecutorial roles of investigation and prosecution. The additional conclusion that the victim has been or will be helpful in the prosecution may be perceived as an endorsement of the victim's credibility. The judge has an ethical obligation both to remain impartial and to avoid even the perception of partiality."¹¹⁷

The Minnesota Board considered whether signing certifications involves judges improperly in the prosecution role of forecasting whether a witness may be helpful to the prosecution. Involvement in the prosecution role could bring into question whether a judge was performing duties "fairly and impartially," Rule 2.2, and whether the judge was impairing public confidences in the impartiality of the judiciary and creating "the appearance of impropriety." Rule 1.2.¹¹⁸ It concluded that post-conviction certifications do not involve such forecasting as to a witness and do not involve judges in functions that are intrinsically those of a prosecutor.¹¹⁹

¹¹⁶ Maryland Judicial Ethics Comm., Op. 20, 9 (2023) (Judges' Signing of Federal U Visa Certifications).

¹¹⁷ Maryland Judicial Ethics Comm., Op. 20, 9 (2023) (Judges' Signing of Federal U Visa Certifications).

¹¹⁸ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 5-6 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹¹⁹ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

The North Carolina Commission, focusing exclusively on pre-trial certifications where there exists a pending criminal case, similarly concluded that

“A judge sits in the role of an impartial arbiter and is responsible for the adjudication, not the prosecution, of criminal matters. A judge is not a representative of the prosecutorial team and should not collude with law enforcement or prosecutors in evaluating the helpfulness of potential witnesses in a case. A judge's determination as to the credibility of victims should be formed through the hearing and trial process, and not be determined prior to adjudication. Such active involvement in securing witnesses for the prosecution and predetermining their helpfulness puts the judge in an inappropriate role that could reasonably suggest bias, or the appearance of bias, on the part of the judge in potential violation of Canon 2A and Canon 3 which require a judge to act to promote public confidence in the impartiality of his or her office.”¹²⁰

The Maryland and Minnesota opinions both confirm that when the criminal case has been completed, judges could sign U-visas without impairing their impartiality. Judges may ethically sign certifications in completed criminal cases based on the record of the case and consistent with the criminal case outcome including in cases that concluded without a verdict.¹²¹ Once a case is completed and is no longer pending, the court will generally have sufficient bases to determine a victim's helpfulness for U visa certification purposes.¹²²

¹²⁰ Judicial Standards Commission State of North Carolina, *Formal Advisory Opinion 2014-03* at 2-3 (August 8, 2024), <https://niwaplibrary.wcl.american.edu/pubs/nc-u-visa-judicial-ethics-advisory-opinion-2014-03/>.

¹²¹ Maryland Judicial Ethics Comm., Op. 20, 9 (2023) (Judges' Signing of Federal U Visa Certifications).

¹²² Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

The Minnesota opinion also recognizes with regard to Rule 1.2, public confidence in an impartial judiciary, that in open criminal cases courts may

“properly make probable cause determinations at early stages of criminal proceedings. When judges assess helpfulness using the same standard as probable cause determinations, certifications may properly be made at an early stage of the case.”¹²³ Whether a judge should sign a U visa certification is an issue of law that does not implicate the Code.”¹²⁴

The Minnesota opinion notes that certification in a civil case before the case is completed could raise impartiality issues similar to those identified in pending criminal cases. However, U visa certification by a judge after a civil court case is completed does not raise impartiality issues.¹²⁵

According to the DHS, a judge’s ability to sign certification is not limited to criminal court cases. “A judge may sign the certification based on having conducted the sentencing in a criminal case. A judge may also sign based on having detected a qualifying crime during a proceeding (criminal or civil) over which they presided.”¹²⁶ DHS also recognizes that a judge that did not preside over the case can sign U visa certifications based on the court records in the case involving the victim.¹²⁷

¹²³ See Section III(E) for a discussion of ethical rules on ex parte communications that apply when judges are considering certification in open civil, family, and criminal court matters that have not been concluded.

¹²⁴ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 8 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹²⁵ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 7 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹²⁶ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

¹²⁷ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3 (February 28, 2022) <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

In both civil and criminal cases a judge may ethically sign certifications when the judge has an adequate basis to support the averments that the court is required to make on the U visa certification form. The court obtains information of victimization and helpfulness from the court proceedings, decisions, court records, and/or the victim's actions in the case. Details about the types of helpfulness a victim could have provided in connection with the court proceedings are discussed in Section II(C)(iv) above.

iv. Judges should only sign certifications based on past or present helpfulness

Judicial certifications should be based on information derived from court records and may be based additionally on the judge's observations in cases when the judge presided over the court case involving the victim. Judicial certifications should not be based on any independent investigation.¹²⁸ All judicial certifications should be limited to past or present helpfulness, and judicial certifications must avoid any prediction of the victim's future helpfulness.¹²⁹ This includes any future helpfulness the victim might provide in a future court case, criminal or civil¹³⁰.

v. To comport with ethical rules, judges must amend the form and place limitations on U visa certifications

The Maryland Judicial Ethics Committee states three specific ways judges should modify the U visa certification form before signing:

1. Judges should state that the "certification is based on information derived from court records and from the judge's observations during proceedings before the judge...The certification should be supported with relevant court records where possible."¹³¹

¹²⁸ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 12 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

¹²⁹ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 12 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

¹³⁰ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 13,16 (August 21, 2023) <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>; Judicial Standards Commission State of North Carolina, *Formal Advisory Opinion 2014-03* at 2 (August 8, 2024) <https://niwaplibrary.wcl.american.edu/pubs/nc-u-visa-judicial-ethics-advisory-opinion-2014-03/>.

¹³¹ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 12 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

To implement this, judges should amend the form to delete the phrase “based upon investigation of the facts” and replace it with language indicating the basis for certification. Examples include:¹³²

- 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 record; and/or
 - Based upon my review of court records and attached documents.¹³³
2. Judges should “explicitly limit the certification to past helpfulness and should explicitly avoid any prediction of helpfulness by the victim in the future.”¹³⁴
3. To be consistent with judicial ethical obligations, judges must strike the last sentence on the certification form which states: “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.” Judges cannot ethically promise any future action regarding the victim.¹³⁵

¹³² *U Visa Certification and T visa Declaration Toolkit for Federal, State and Local Judges, Commissioners, Magistrates and Other Judicial Officers* at 10, 100, 114 (June 17, 2021) <https://niwaplibrary.wcl.american.edu/pubs/judges-u-and-t-certification-toolkit-2/> (Contains a sample completed judicial U visa certification form at 97-101).

¹³³ A victim seeking certification may have attached to the certification request documents that might include: police report(s); incident report(s); photographs, medical records.

¹³⁴ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 12 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

¹³⁵ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 12-13, 16 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

vi. *Recusal in future cases involving the same parties and the same or similar issues*

The judge who signs a U visa certification has an increased risk of having their impartiality questioned in future proceedings. In order to comply with the judicial ethics code's requirements regarding impartiality and avoiding the appearance of impropriety in any subsequent proceeding involving the same or similar issues and the same victim and perpetrator, judges will need to disclose the U visa certification and be prepared to entertain a request for recusal.¹³⁶ As discussed above, a number of courts across the country have reduced the need for recusal by assigning one certifier judge or having the presiding judge responsible for U visa certifications for the entire court.

C. **ABA Model Code of Judicial Conduct Rule 3.3 – Signing a U Visa certification is not an impermissible character reference**

Another issue that judicial ethics boards have ruled on relates to the distinction between certifying helpfulness and testifying or vouching for the character of the person seeking certification. Signing a U visa certification is not an impermissible character reference.

i. *Text of Relevant Rule*

Model Conduct Rule 3.3: Testifying as a Character Witness states that:

“A judge shall not testify as a character witness in a judicial, administrative, or other adjudicatory proceeding or otherwise vouch for the character of a person in a legal proceeding, except when duly summoned.”¹³⁷

¹³⁶ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 16 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>; Judicial Standards Commission State of North Carolina, *Formal Advisory Opinion 2014-03* at 3 (August 8, 2024), <https://niwaplibrary.wcl.american.edu/pubs/nc-u-visa-judicial-ethics-advisory-opinion-2014-03/>.

¹³⁷ MODEL CODE OF JUDICIAL CONDUCT, r. 3.3: Testifying as a Character Witness (Am. Bar Ass'n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_3/rule3_3testifyingasacharterwitness/.

ii. *Signing a U visa certification is not an impermissible character reference*

In 2014 The North Carolina Judicial Standards Commission's Advisory Opinion misconstrued the nature of certification, characterizing it as voluntary character testimony and stating that "A judge should not make personal recommendations to a federal agency predicting how useful a victim or witness might or might not be to a future prosecution."¹³⁸ This North Carolina opinion also erroneously interprets¹³⁹ certification as to helpfulness as, "in essence the endorsement of the victim's honesty, reliability, potential for cooperation and other character traits."¹⁴⁰

Both DHS and each Judicial Ethics Board that has issued an opinion¹⁴¹ since the North Carolina Judicial Standards Commission was issued in 2014 have all disagreed with North Carolina's conclusion. 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."¹⁴²

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.¹⁴³

¹³⁸ *Formal Advisory Opinion: 2014-03* (N.C. Jud. Standards Comm'n Aug. 8, 2014).

¹³⁹ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 5 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-broard-judicial-standards-opinion-2015-2-final/> (Disagreeing with the North Carolina opinion stated "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.").

¹⁴⁰ *Formal Advisory Opinion: 2014-03* at 2 (N.C. Jud. Standards Comm'n Aug. 8, 2014).

¹⁴¹ Maryland Judicial Ethics Comm., Op. 20, 7 (2023) (Judges' Signing of Federal U Visa Certifications); Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 5 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-broard-judicial-standards-opinion-2015-2-final/>.

¹⁴² Dep't of Homeland Sec., *U and T Visa Law Enforcement Resource Guide*, 6 (2015), <http://library.niwap.org/wp-content/uploads/DHS-U-and-T-Visa-Law-Enforcement-Resource-Guide-11.30.15.pdf>.

¹⁴³ MODEL CODE OF JUDICIAL CONDUCT, Canon 3, r. 3.2, Comment [1] (Am. Bar Ass'n 2010) ("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.").

According to DHS, when a certifying official, including a judge, completes a U visa certification the certification simply attests to the following facts:¹⁴⁴

1. A qualifying criminal activity occurred;
2. The victim possesses information about the criminal activity; and
3. The victim has been or is being helpful in the detection, investigation, prosecution, conviction, or sentencing of the criminal activity.

This is a fact-based assessment, where the certifying official “confirm[s] to USCIS that a qualifying crime has occurred and that the victim was helpful, is being helpful, or is likely to be helpful in the investigation or prosecution of criminal activity.”¹⁴⁵ Judges, however, always certify based on a victim’s past or present helpfulness, which once established eliminates the need for predictions of future helpfulness and which judges cannot ethically make.

Judges who sign U Visa certifications are not acting as character witnesses. Maryland Judicial Ethics Committee does not consider U-visa certification an impermissible character reference in violation of judicial ethics rules. The Committee stated that “[t]he quality certified is helpfulness...[a]lthough it is unlikely that a victim who is fundamentally incredible would be regarded as “helpful,” a judge does not need to make specific credibility determinations to conclude that the victim was “helpful.” More broadly, the relatively narrow “helpfulness” conclusion does not amount to a general vouching for good character”¹⁴⁶ in violation of judicial ethics rules.

¹⁴⁴DHS *U and T Visa Law Enforcement Resource Guide Updated November 30, 2015* at 6 <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015/>; *U Visa Law Enforcement Resource Guide* at 4 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>;

¹⁴⁵ *U Visa Law Enforcement Certification Guide* at 2.

¹⁴⁶ Maryland Judicial Ethics Comm., Op. 20, 7 (2023) (Judges’ Signing of Federal U Visa Certifications).

The Minnesota Board of Judicial Conduct concurred stating, “[i]n 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.”¹⁴⁷ The State of Minnesota’s National Judicial Training Update on the Minnesota Board’s 2015 U visa advisory opinion further clarified:

“Judges are not testifying as character witnesses when they make U visa certifications. Certifications do not vouch for the alien’s character. Instead, it pertains to the court’s averments regarding observations of the alien’s helpfulness or a review of court records, transcripts, recordings, and judicial findings that contain evidence of helpfulness.”¹⁴⁸

D. ABA Model Code of Judicial Conduct Rule 2.10 – U Visa Certification Does Not Violate Public Statements Prohibitions

When a judge signs a U visa certification based on past helpfulness the victim has provided to the court based on court orders, the judge’s observations of the victim’s actions in a court case, or the record of proceedings over which the judge or another judge in the court presided, the certification would not be considered an inappropriate public statement that could be suggestive of the judge’s pre-judgment of a pending court matter.

i. Text of Relevant Rule

Rule 2.10 – Judicial Statements on Pending and Impending Cases –

“(A) A judge shall not make 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.

¹⁴⁷ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 5 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹⁴⁸ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 5 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

(B) A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”¹⁴⁹

ii. U visa certification does not violate the public statements provision

Minnesota’s National Judicial Training Update following the issuance of the Minnesota Board of Judicial Standards U visa advisory opinion in 2015 explained that:

“The Model Code creates an exception that ‘a judge may make public statements in the course of official duties.’¹⁵⁰ In an open case the prohibition does not apply to U visa certifications because federal law and DHS regulations list judges as U visa certifiers making U visa certification one of the judges’ official duties. Certifications occurring after a civil or criminal matter has been completed do not implicate this rule.”¹⁵¹

The signing of a U visa certification form that a victim submits to USCIS as required evidence for the victim’s U visa application is distinguishable from other types of behavior where judges have been found to have made inappropriate public comments. Public comment by a judge has been defined as a judge’s remarks and comment to the media,¹⁵² including when a judge “held a press conference in chambers, granted interviews, and appeared on several television news shows.”¹⁵³ The Code of Conduct for United States Judges Canon 3A(6) states that a “judge should not make public comment on the merits of a matter. . . the prohibition on public comment on the merits does not extend to public statements made in the course of the judge’s official duties...”¹⁵⁴

¹⁴⁹ MODEL CODE OF JUDICIAL CONDUCT, r. 2.10:Judicial Statements on Pending and Impending Cases (Am.BarAss’n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_10judicialstatementsonpendingandimpendingcases/.

¹⁵⁰ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know at 5 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

¹⁵¹ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, Crime National Judicial Training Update 15-13, Immigrant Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know at 5 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>.

¹⁵² United States v. Microsoft Corp., 253 F.3d 34, 107 (D.C. Cir. 2001).

¹⁵³ In re Charge of Judicial Misconduct, 47 F. 3d 399 (Feb. 1995).

¹⁵⁴ Guide to Judiciary Policy, Vol. 2A, Ch. 2 at 7 https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf.

Judicial signing of U visa certifications was specifically authorized by Congress as a power given to judges in the Violence Against Women Act of 2000.¹⁵⁵ Since the authority to sign U visa certifications was granted to judges by Congress in the federal U visa statute, signing certifications is part of a judge's official duties. The Minnesota Board of Judicial Standards opinion makes the distinction, consistent with DHS regulations, policies and guidance, 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 Minnesota Board further noted that since signing a U visa certification is one of the judge's official duties, then the prohibition on official statements does not apply.¹⁵⁶

Lastly, a U visa certification signed by a judge is also not a public statement because the U visa certification is filed in the victim's U visa case file that is confidential and not open to the public or obtainable from DHS.¹⁵⁷ The only exception is that the judicial certification may need to be disclosed to a defendant in pending criminal proceedings.¹⁵⁸

E. ABA Model Code of Judicial Conduct Rules 2.2, 2.9, and 2.11 – U Visa Certification in Closed Cases Does Not Implicate the Ex Parte Communications Bar, in Open Cases Requires VAWA Confidentiality Compliant Notice and When Recusal is Appropriate

This section will discuss how judges can sign U visa certifications in a manner that is consistent with and does not violate the following ABA judicial ethical rules by following the procedures outlined in this article.

i. Text of Relevant Rules

- Rule 2.2: Impartiality and Fairness: "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially."¹⁵⁹

¹⁵⁵ VAWA 2000, § 1513(b) and (c), Pub. L. No. 106-386, 114 Stat. 1464. 8 U.S.C. 1101(a)(15)(U)(i)(III); 8 U.S.C. § 1184(p)(1).

¹⁵⁶ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 5 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹⁵⁷ 8 U.S.C. § 1367(a)(2).

¹⁵⁸ 8 C.F.R. § 214.14(e)(1)(ix). 72 Fed. Reg. 53027 (September 17, 2007).

¹⁵⁹

https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_2impartialityandfairness/

- Rule 2.11(A)(6)(d): Disqualification: “(A) A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to the following circumstances...
 - 1) “(6) The judge: ... (d) previously presided as a judge over the matter in another court.”¹⁶⁰
- Rule 2.9: Ex Parte Communications: “(A) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:
 - 1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
 - a. the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
 - b. the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond...
 - 2) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.”

Whether and how judicial ethics rules limiting ex parte communications and potentially implicating judicial fairness apply when a court is asked to sign a U visa certification for an immigrant crime victim will depend on whether the court proceeding involving the immigrant victim seeking certification is an open, pending, or impending proceeding or a case that has been concluded, completed, or closed.

¹⁶⁰ MODEL CODE OF JUDICIAL CONDUCT, r. 2.11 (Am. Bar Ass’n 2010), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification/.

The ABA Code of Model Judicial Conduct applies the following definitions in its terminology section:

- **Impending matter:** “is a matter that is imminent or expected to occur in the near future.”¹⁶¹
- **Pending matter:** “is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.”¹⁶²

ii. *U visa Certification in Open Pending and Impending Cases*

The U visa statute and regulations were designed to encourage certifying government officials to sign U visa certifications very soon after a criminal activity is detected, and a victim provides initial helpfulness to law enforcement, prosecutors, or other government agencies conducting investigations that detect qualifying criminal activities.¹⁶³ The U visa regulations are carefully crafted to reflect Congresses’ intent. DHS defines helpfulness in “investigation or prosecution” as “includ[ing] detection, conviction, and sentencing of the qualifying criminal activity they were a victim of.”¹⁶⁴ DHS’s definitions reflect Congresses’ recognition that judges will only be able to certify on the basis of detection, because “[j]udges neither investigate crimes nor prosecute perpetrators.”¹⁶⁵

The U visa regulations also recognize “that Congress intended for individuals to be eligible for U nonimmigrant status at the very early stages of an investigation”¹⁶⁶ in which the qualifying criminal activity was detected.

¹⁶¹MODEL CODE OF JUDICIAL CONDUCT, Preamble (Am. Bar Ass’n 2011), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf.

¹⁶²MODEL CODE OF JUDICIAL CONDUCT, Preamble (Am. Bar Ass’n 2011), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_preamble_scope_terminology.pdf.

¹⁶³ *U visa Certification and T visa Declaration Toolkit for Law Enforcement Agencies and Prosecutors* at 5, 16, 26, 28, 43, 50, 53, 65, 72 (August 30, 2021), <https://niwaplibrary.wcl.american.edu/pubs/u-t-visa-toolkit-law-enforcement-prosecutor/>;

Child Protective Services Agency Toolkit: U Visa Certification, T Visa Declaration, Special Immigrant Juvenile Status and Violence Against Women Act Immigration Relief for Abused Immigrant Children at 7, 11, 45, 46, 48, 52 (July 8, 2024), <https://niwaplibrary.wcl.american.edu/pubs/cps-toolkit/>; *U Visa Certification and T Visa Declaration Toolkit for Adult Protective Services (APS)* at 24, 39, 40, 54, 56, 60, 74, 78, 83, 94 (October 19, 2023), <https://niwaplibrary.wcl.american.edu/pubs/aps-u-visa-toolkit/>.

¹⁶⁴ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at ii (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>.

¹⁶⁵ 72 Fed. Reg. 53,014, 53,020 (Sept. 17, 2007).

¹⁶⁶ 72 Fed. Reg. 53,014, 53,019 (Sept. 17, 2007).

DHS explains that:¹⁶⁷

“There is no required time when you may or may not sign a certification. It is possible to sign a certification at any stage in the case, including at the point of detection, during an investigation, when the prosecutor initiates a prosecution, before a trial, whether or not the victim is needed to testify, and after the case is concluded.

You may sign a certification regardless of the outcome of the qualifying criminal case, including in the following instances:

- 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 or not the plea was to an offense that is a qualifying criminal activity; and
- the defendant was found not guilty.”

iii. Whether judges should certify in open and pending cases is matter of law not judicial ethics, however, in open cases ex parte communications ethics rules apply

With regard to judicial certifications, the Minnesota Board on Judicial Standards states “the certification is in the nature of a probable cause determination which a judge may properly make at an early stage of the case...given the present lack of clarity in the law, the Board believes that whether a judge in a criminal case may sign an I-918B form prior to completion of the case is primarily an issue of law rather than an issue of compliance with the Code...A judge should disclose a pre-conviction certification.”¹⁶⁸

¹⁶⁷ DHS, U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL, AND TERRITORIAL LAW ENFORCEMENT, PROSECUTOR, JUDGES, AND OTHER GOVERNMENT AGENCIES at 18-19 (2015)

<https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015>.

¹⁶⁸ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6-7 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

Addressing civil cases, the Minnesota Board came to a similar conclusion. “Certification in a civil case before the case is completed may raise impartiality issues under Rule 2.2 and 2.11, similar to those identified above regarding certifications signing in pending criminal cases. Since a party to the civil case other than the one requesting the certification may consider the certification relevant to the judge's impartiality, a certification should be disclosed under Rule 2.11”¹⁶⁹

The state of Minnesota in its Judicial Training and Education Blog in 2015 following the Minnesota Board’s opinion explained that “Since in an ongoing civil or criminal case a party may consider certification relevant to the judge’s impartiality or a violation of ex parte communication rules in “pending or impending matter[s]” the court should give parties notice of the certification request and disclose when certification is made.”¹⁷⁰

In open criminal, civil, and family court cases when the judge who will be presiding over the case pending before the court is the judge from whom certification will be requested, Rules 2.2, 2.9, and 2.11(A)(6)(d) would require a notice and motion process to promote impartiality and fairness and avoid ex parte communications. However, since the U visa is one of the protections created by the Violence Against Women Act (VAWA) to protect victims of domestic violence, sexual assault, child abuse, stalking, dating violence, and human trafficking, under federal law VAWA confidentiality protections apply to any victim who is in the process of filing a U visa. VAWA confidentiality laws help protect victims from further crime victimization, abuse, deportation threats, and other harms that could be triggered when the abuser learns that the victim is seeking U visa immigration relief.

The next section will discuss the steps courts can take to balance the need to provide victims access to justice, including judicial certifications, with judicial ethics rules regarding impartiality and ex parte communications.

¹⁶⁹ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6-7 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-board-judicial-standards-opinion-2015-2-final/>.

¹⁷⁰ Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 5 (July 8, 2015), <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training- update/>.

iv. *Violence Against Women Act (VAWA) confidentiality statutory protections for U visa victims*

Abusers and crime perpetrators frequently attempt to exert power and control over their victims by trying to use the immigration system to track and stalk victims, to trigger immigration enforcement actions against victims, and to interfere with and attempt to undermine the victims' ability to attain legal immigration status. Victims can face increased danger when perpetrators learn that victims are taking steps to free themselves from abusive homes, workplaces, and other situations. It is well documented that when victims of domestic violence,¹⁷¹ trafficking,¹⁷² and workplace sexual violence¹⁷³ try to leave, the likelihood that the perpetrator will retaliate using violence, threats, or immigration related abuse is high.¹⁷⁴

In response, Congress created federal VAWA confidentiality laws¹⁷⁵ that protect immigrant victims of U visa listed criminal activities from having any information on a U visa application disclosed to their perpetrator or anyone who could provide the information to the perpetrator. This includes the existence of the application, actions taken, or information contained in their VAWA, T visa, and U visa applications for immigration relief disclosed or released to their perpetrator or anyone who could provide the information to the perpetrator.¹⁷⁶

¹⁷¹ VAWnet & The National Resource Center on Domestic Violence, Intimate Partner Homicide Prevention (July 2011), <http://www.vawnet.org/special-collections/DVHomicide.php> – 200.

¹⁷² The Human Trafficking Legal Center, *Human Trafficking and Domestic Violence, Fact Sheet* (September 2012), <https://www.htlegalcenter.org/wp-content/uploads/Human-Trafficking-and-Domestic-Violence-Fact-Sheet.pdf>.

¹⁷³ Southern Poverty Law Center, *Under Siege: Life for Low-Income Latinos in the South* at 30 (April 2009), <https://www.splcenter.org/20090331/under-siege-life-low-income-latinos-south>.

¹⁷⁴ Leslye E. Orloff, Benish Anver & Rafaela Rodrigues, *Bench Card on Violence Against Women Act (VAWA) Confidentiality* at 1-2 (2021), <https://niwaplibrary.wcl.american.edu/pubs/family-court-bench-card-vawa-confidentiality>.

¹⁷⁵ 8 U.S.C. § 1367

¹⁷⁶ For a full legislative and regulatory history and DHS regulations and policies implementing VAWA confidentiality protections, including for U visa applications, see Alina Husain, Daliana Gomez Garcia, and Leslye Orloff, *VAWA Confidentiality: Statutes, Legislative History, and Implementing Policy* (June 7, 2022) <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-statutes-leg-history>.

In creating VAWA's confidentiality provisions Congress was explicit about its intent.

"In 1996, Congress created special protections for victims of domestic violence against disclosure of information to their abusers and the use of information provided by abusers in removal proceedings. In 2000, and in this Act, Congress extended these protections to cover victims of trafficking, certain crimes and others who qualify for VAWA immigration relief. These provisions are designed to ensure that abusers and criminals cannot use the immigration system against their victims. Examples include abusers using DHS to obtain information about their victims, including the existence of a VAWA immigration petition, interfering with or undermining their victims' immigration cases, and encouraging immigration enforcement officers to pursue removal actions against their victims."¹⁷⁷

"This Committee wants to ensure that immigration enforcement agents and government officials covered by this section do not initiate contact with abusers, call abusers as witnesses or relying on information furnished by or derived from abusers to apprehend, detain and attempt to remove victims of domestic violence, sexual assault and trafficking, as prohibited by section 384 of IIRIRA."¹⁷⁸

The point at which victims begin receiving VAWA confidentiality protections varies by the type of crime victimization involved. Crucially, these protections apply *regardless of whether the victim* has filed for a crime victim-based form of immigration relief.¹⁷⁹

¹⁷⁷ DEP'T OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. NO. 109-233, 122 (2005) <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/>.

¹⁷⁸ DEP'T OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, FISCAL YEARS 2006 THROUGH 2009, H.R. NO. 109-233, 122 (2005) <http://niwaplibrary.wcl.american.edu/pubs/conf-vawa-lghist-dojexcerptshr-3402-09-22-2005/>.

¹⁷⁹ 8 U.S.C. § 1367(a)(1).

Victims of spouse abuse or child abuse receive protection from VAWA confidentiality statutes when they first suffer battering or extreme cruelty perpetrated by their spouse, former spouse, parent, step-parent, or certain other family members.¹⁸⁰ Immigrant victims of intimate partner violence, sexual assault, human trafficking, and other U visa listed crimes receive VAWA confidentiality protections when they are seeking to file a U or T visa or when a DHS employee has reason to believe they may victim eligible to file for T or U visa protection.¹⁸¹

DHS recognizes Congressional intent to prevent disclosure of sensitive information to abusers.¹⁸² DHS' implementing VAWA Confidentiality guidance states that any information related to noncitizens who are "seeking or who have been approved for immigration status"¹⁸³ under the U visa, T visa, or other VAWA immigration programs may not be disclosed. Victims seeking to apply for a form of VAWA confidentiality protected immigration relief receive VAWA confidentiality protections. This includes protection of the victim's "information that has not yet been included in a [DHS] database."¹⁸⁴ "The nondisclosure provision provides protection as soon as a DHS employee has reason to believe that the alien may be the beneficiary of a pending or approved victim-based application or petition, and the limitation ends when the victim becomes a naturalized citizen¹⁸⁵ or when the application for relief is denied on its merits and all opportunities for appeal of the denial have been exhausted."¹⁸⁶

¹⁸⁰ 8 U.S.C. § 1367(a)(1)(A)-(D).

¹⁸¹ 8 U.S.C. § 1367(a)(1)(E)-(F); DHS, INSTRUCTION NUMBER: 002-02-001.01, SECTION IV(F)(1), IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS at 3 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

¹⁸² Paul Virtue, *Immigration and Naturalization Services, Non-Disclosure and Other Prohibitions Relating to Battered Aliens: IIRIRA Section 384 2* (May 5, 1997) (Discussing VAWA confidentiality's legislative history reflecting concerns designed to stop abusers from obtaining information about the whereabouts of victims and information about victim-based immigration cases from immigration officials.).

¹⁸³ DHS, INSTRUCTION NUMBER: 002-02-001.01, SECTION IV(F)(1), IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS at 3 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

¹⁸⁴ DHS, INSTRUCTION NUMBER: 002-02-001.01, SECTION VI(A)(1)(A), IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS at 6 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

¹⁸⁵ The period of time that passes from the date that a victims filed their U visa application through the date that a victim granted a U visa, lawful permanent residency and ultimately naturalization as recipient of a U visa can take up to or more than two decades. For information on VAWA confidentiality protections ending generally at naturalization see, *Customer Service and Interpretation of 8 U.S.C. 1367 (VAWA) Confidentiality Protections for U.S. Citizens* (June 12, 2024) <https://niwaplibrary.wcl.american.edu/pubs/vawa-confidentiality-and-naturalization/>.

¹⁸⁶ DHS, INSTRUCTION NUMBER: 002-02-001.01, VI(A)(1)(C), IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS at 6 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

Statutory exceptions to VAWA confidentiality are very limited.¹⁸⁷ Even when disclosure is allowed to law enforcement, national security agencies, or for judicial review of a victim's immigration case¹⁸⁸ agencies are required to handle the information "in a manner that protects the confidentiality of such information."¹⁸⁹ In criminal cases where a U visa or T visa certification has been signed by law enforcement, prosecutors, or the judge hearing the pending criminal case, the certification itself and any accompanying cover letter may be subject to the prosecutor's discovery obligations in a criminal case.¹⁹⁰ All other information, including the existence of the application, actions taken, or documents or details contained within the VAWA confidentiality-protected immigration case file, is "absolutely privileged information"¹⁹¹ that remains strictly protected and non-discoverable in any criminal, family, or civil case.¹⁹²

The Maryland Judicial Ethics Committee issued two opinions in which they concluded that, under Maryland Rule 18-102.9,¹⁹³ Maryland judges considering U visa certification requests must ensure that "all parties to the proceeding are notified of the request and the judge's action on it. The judge should also allow a reasonable opportunity for any party to the proceeding to respond to the request."¹⁹⁴

¹⁸⁷ 8 U.S.C. § 1365(b); DHS, Memorandum For All OPLA Chief Counsel: VAWA 2005 Amendments To The Immigration Laws at 25 (Feb. 1, 2007), <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>; 8 U.S.C. § 1367; see also, USCIS, Policy Manual, 1, part 7. (1 USCIS-PM A.7.) (Sept. 27, 2023), <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7>.

¹⁸⁸ Hawke v. United States Dep't of Homeland Security, 2008 U.S. Dist. LEXIS 87693, at *1 (N.D. Cal. Sept. 29, 2008); DHS, Memorandum For All OPLA Chief Counsel: VAWA 2005 Amendments to The Immigration Laws at 25 (Feb. 1, 2007), <http://niwaplibrary.wcl.american.edu/pubs/iceopla-vawa-confidentiality-2007-foia/>; 8 U.S.C. § 1367; see also, 1 USCIS-PM A.7. (Sept. 27, 2023), <https://www.uscis.gov/policy-manual/volume-1-part-a-chapter-7>.

¹⁸⁹ 8 U.S.C. § 1365(b); DHS, INSTRUCTION NUMBER: 002-02-001.01, IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS at 6 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

¹⁹⁰ For detailed information see, National Judicial Network Peer-to-Peer Sessions – Violence Against Women Act (VAWA) Confidentiality: Criminal and Family Case Discovery (October 1 & Nov. 12, 2024) <https://niwaplibrary.wcl.american.edu/njn-vawa-criminal-case-discovery-oct-1-2024/> (Discovery in criminal cases that meet the Brady exception are limited to the U visa certification itself and any cover letter provided to the law enforcement, prosecutor, or judicial certifier. No other information about the existence of, actions taken in, or documents contained in the federal U visa immigration case file are discoverable. Courts have ruled that the defendant in a criminal case cannot obtain VAWA confidentiality protected information from the victim, the victim's attorney, a victim advocacy program serving the victim or DHS).

¹⁹¹ Hawke v. U.S. Dep't of Homeland Sec., No. C-07-03456 RMW, 2008 WL 4460241, at *7 (N.D. Cal. Sept. 29, 2008).

¹⁹² Rafaela Rodrigues, Leslye E. Orloff & Gabriela Rezetko, How to Argue or Rule on VAWA Confidentiality Protections in Discovery Involving Immigrant Survivors, NIWAP (2022), <https://niwaplibrary.wcl.american.edu/pubs/how-to-vawa-confidentiality-discovery>

¹⁹³ This rule is substantively similar to MODEL CODE OF JUDICIAL CONDUCT, r. 2.9: Ex Parte Communications (Am. Bar Ass'n 2011), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_9expartecomunications/.

¹⁹⁴ Maryland Judicial Ethics Comm., Op. 24, 6-8 (2024) (Judges' Signing of Federal U Visa Certifications-- Supplemental Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 7(August 21, 2023) <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>.

Thereafter, the Committee was asked to reconsider its opinion in light of federal VAWA confidentiality protections,¹⁹⁵ and upon reconsideration, the Committee confirmed its prior decision and its application to both open and closed cases.¹⁹⁶ This conclusion misunderstands federal law and fails to appreciate the nuances of VAWA confidentiality and the U visa certification process. Maryland Judicial Ethics Committee opinion 2024-24 requires notice and an opportunity to be heard in all cases where a victim requests U visa certification from a judge. This means that the perpetrator and all other parties are entitled to notice, even in closed and completed cases. The opinion does not limit the notice requirement to open and pending cases and that failure points to the flaw in the opinion.

It appears that the Maryland Committee's opinion is based on its erroneous assumption that all U visa certification requests must relate to adversarial judicial proceedings.¹⁹⁷

This assumption is fundamentally flawed and can have a chilling effect on access to justice. This assumption is also not supported by DHS and USCIS experts on U visa immigration law.¹⁹⁸ Victims are eligible for U visa certification when they provide information to a court from which the court detects a qualifying criminal activity that they or their child suffered. This helpfulness can be demonstrated by the victim in court filed pleadings, motions, or brief(s), at hearings, through testimony, or through documentary evidence submitted to the court.

¹⁹⁵ 8 U.S.C. § 1367

¹⁹⁶ Maryland Judicial Ethics Comm., Op. 24, 7-9 (2024) (Judges' Signing of Federal U Visa Certifications -- Supplemental Opinion).

¹⁹⁷ Maryland Judicial Ethics Comm., Op. 24, 8 (2024) (Judges' Signing of Federal U Visa Certifications -- Supplemental Opinion). ("The Committee's concern is that any judicial U visa certification necessarily is related to the judge's presiding over an adversarial judicial proceeding. In Opinion 2023-20, the Committee considered the important difference between making a certification based on open versus closed proceedings. As quoted above, the Committee opined that "[a] Maryland judge should complete a DHS Form I-918B only when the necessary conclusions can be made based on completed proceedings." Opinion 2023-20 at 15. This is because of the likely need for recusal in any subsequent proceedings involving the same parties. In the Committee's view, the need to avoid ex parte communications related to the request to complete a DHS Form I-918B arises from the fact that the parties necessarily were involved in a prior adversarial proceeding before that judge and from the potential for future proceedings either on reopening of the prior proceedings or initiation of different, but related proceedings. The Committee does not believe the issue can be avoided simply by classifying completion of a DHS Form I-918B as an administrative function, even if the Maryland Rules other than the Maryland Code of Judicial Conduct could be construed to support such a classification.")

¹⁹⁸ U Visa Law Enforcement Resource Guide at 3 (February 28, 2022, <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>) ("A judge may also sign based on having detected a qualifying crime during a proceeding (criminal or civil) over which they presided."); *DHS U and T Visa Law Enforcement Resource Guide* at 18-19 (November 30, 2015), <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015>

The case may have been a family case (e.g., protection order, divorce, custody, guardianship, child welfare) or a civil court action (e.g., employment discrimination, tort, small claims, landlord tenant) that was uncontested or settled before trial. It may have been a criminal case that ended in a plea, diversion, or a dismissal. In any of these completed cases that did not end up in trial as an adversarial judicial proceeding a victim could have provided evidence of crime victimization and helpfulness sufficient under federal U visa immigration laws to support judicial U visa certification.¹⁹⁹

In evaluating whether federal VAWA confidentiality laws protect U visa victims applying for certification, the analysis in the Maryland opinion reflects a complete lack of appreciation of the legislative history and purpose of VAWA confidentiality laws. The United States Court of Appeals for the Fifth Circuit in *Cazorla v. Koch Foods of Mississippi*²⁰⁰ discussed the importance of the U visa program and the VAWA confidentiality protections afforded U visa applicants under federal immigration law. In denying an employer's discovery requests in an employment discrimination case brought by the EEOC²⁰¹ on behalf of over fifty (50) workers who suffered physical and sexual assaults while working in a poultry processing plant and vacating the district court's discovery orders the 5th Circuit in *Cazorla v. Koch Foods of Mississippi*²⁰² held that:

"there remains a risk that U visa discovery will cause some claimants or family members to lose their jobs...Nonetheless, if claimants have applied for U visas, their jobs may still be on the line."²⁰³

(Providing examples for certifying officials signing in a range of civil, family, and criminal cases that concluded without a trial: Civil -- a case brought by the EEOC or DOL resulted in a settlement, or dismissal; Family -- a judge issued a protection order or custody order; a child abuse case settled; Criminal -- the prosecutor decided not to prosecute; the grand jury did not issue an indictment; the case was dismissed by the prosecutor or a judge; the defendant entered a plea).

¹⁹⁹ *U Visa Law Enforcement Resource Guide* at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>; *DHS U and T Visa Law Enforcement Resource Guide* at 19 (November 30, 2015) <https://niwaplibrary.wcl.american.edu/pubs/dhs-updated-u-certification-resource-guide-2015>.

²⁰⁰ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 (5th Cir. 2016) <https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>.

²⁰¹ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, at 2 (5th Cir. 2016), <https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>.

²⁰² *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, at 34 (5th Cir. 2016) <https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>.

²⁰³ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, at 28 (5th Cir. 2016), <https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>.

The Fifth Circuit also recognized that VAWA confidentiality was designed to prevent information about a victim's U visa case and immigration status being obtained by the victim's abuser and used against the victim.

"Claimants might not have feared revealing their status only to federal officials who process U visa applications, since those officials apparently are not involved in immigration enforcement. An abuse victim might well be willing to disclose sensitive information to a few sympathetic officials, yet nonetheless fear that his or her abuser might obtain that information and spread it far and wide."²⁰⁴ In other words, the claimants reasonably might fear disclosure of their status to certain authorities, but not others, so their having submitted U visa applications does not rule out an *in terrorem* effect from further disclosure, as the district court apparently believed."²⁰⁵

The 5th Circuit Court of Appeals in *Cazorla v. Koch Foods of Mississippi* recognized that actions a court takes in an individual U visa case has ripple effects that could not only harm the individual victim before the court, but can also impact the effectiveness of the U visa program in building trust essential to promoting access to justice for immigrant victims of abuse. The Court described the important purpose of VAWA confidentiality protections for U visa victims as follows:

"More pressing is that the district court did not address how U visa litigation might intimidate individuals outside this litigation, compromising the U visa program and law enforcement efforts more broadly."²⁰⁶

²⁰⁴ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, at 29 n.71 (5th Cir. 2016) "Undocumented immigrants can and do distinguish between revealing their status to U visa authorities and other officials: tens of thousands apply for U visas each year." See Number of I-918 Petitions, *supra* note 67."

²⁰⁵ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 at 29 n.72 (5th Cir. 2016) "Plaintiffs also point out that an immigrant need not be undocumented to fear U visa discovery. See *Rivera*, 364 F.3d at 1065 ("Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the relationship between their litigation and immigration status, might choose to forego civil rights litigation.")".

²⁰⁶ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540 at 31(5th Cir. 2016), <https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>.

“These dynamics jeopardize the EEOC’s interests and those of the broader public. The district court could and should have weighed them in its Rule 26 analysis. But its analysis considered only the immediate chilling effect of U visa discovery *on the individual claimants in this case*. Those individuals are not the only ones who might be affected by the disclosure of the claimants’ U visa information. Thousands apply for U visas each year, and they do so with the assurance that federal authorities will keep their applications confidential.²⁰⁷ Allowing U visa discovery from the claimants themselves in this high-profile case will undermine the spirit, if not the letter, of those Congressionally sanctioned assurance and may sow confusion over when and how U visa information may be disclosed, deterring immigrant victims of abuse – many of whom already mistrust the government ²⁰⁸ – from stepping forward and thereby frustrating Congress’s intent in enacting the U visa program.”(Italics in original) ²⁰⁹

“This is a serious concern for plaintiff EEOC, *amicus* NLRB, and the federal and state departments of labor, all of which certify U visa applications. Considerable evidence suggests that immigrants are disproportionately vulnerable to workplace abuse and, not coincidentally, highly reluctant to report it for fear of discovery and retaliation. And threats of deportation are among the most familiar and dreaded means by which unscrupulous employers retaliate against immigrant employees”.

²⁰⁷ See, e.g., *Immigration Options for Victims of Crimes: Information for Law Enforcement, Healthcare Providers, and Others*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES (Feb. 2010), <https://www.dhs.gov/publication/immigration-options-victims-crime> (brochure stating that “all agencies within the Department of Homeland Security (DHS), including USCIS, are legally prohibited from disclosing that a victim has applied for VAWA, T, or U immigration benefits”); U.S. Citizenship & Immigration Servs., *Privacy Waiver Authorizing Disclosure to a Third Party, ICE Form 60-001* at 1-2 (Feb. 2011), <https://www.ice.gov/doclib/news/library/forms/pdf/60-001.pdf> (“[Y]ou are under no obligation to consent to the release of your information to any third party...If you have applied for or received [a U visa], you are legally entitled to confidentiality.”).

²⁰⁸ See, e.g., Alexander & Prasad, *supra* note 59, at 1101 & n.10; Stephen Lee, *Monitoring Immigration Enforcement*, 53 ARIZ. L. REV. 1089, 1100-03 (2011); Meng et al., *supra* note 59, at 72-76.

²⁰⁹ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, (5th Cir. 2016) at 31-32 <https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>

Thus, if the agencies cannot credibly assure potential U visa seekers that their sensitive information will be kept private, they may become much less able to use the program to solicit cooperation from those most in need of their help. Protective orders will not necessarily reassure potential claimants. Nor can the agencies easily reassure potential claimants that although U visa discovery was allowed in this case, it will not be allowed in *their* cases.” (Footnoted omitted italics in original)²¹⁰

The Maryland Judicial Ethics Committee, like the trial court judge that the 5th Circuit overruled in *Cazorla v. Koch Foods of Mississippi*, failed to appreciate the importance for U visa eligible victims of VAWA confidentiality protections to victim safety and promoting access to justice. Additionally, the Maryland Committee appears to have misunderstood when immigrant crime victims are entitled to VAWA confidentiality’s protections as U visa eligible victims under federal immigration laws.

The Maryland Committee concluded that:

“DHS Form I-918B completed by a Maryland judge is information provided to the applicant to be used in the federal administrative proceedings. It is not information disclosed from those administrative proceedings or information received by the certifying judge. The regulation therefore does not require that the certification process outside the federal administrative proceedings be confidential.”

This conclusion is inconsistent with DHS directives governing when U visa victims receive VAWA confidentiality protections. VAWA confidentiality protections apply to U visa victims when they are “seeking or who have been approved for immigration status”²¹¹ This includes when a “DHS employee has reason to believe that the alien may be the beneficiary of a pending or approved victim-based application or petition.”²¹²

²¹⁰ *Cazorla v. Koch Foods of Miss., L.L.C.*, 838 F.3d 540, (5th Cir. 2016) at 32-33

<https://niwaplibrary.wcl.american.edu/pubs/cazorla-v-koch-eeoc-5th-cir-2017/>

²¹¹ DHS, *Instruction Number: 002-02-001.01, Section IV(F)(1), Implementation Of Section 1367 Information Provisions* at 3 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

²¹² DHS, *INSTRUCTION NUMBER: 002-02-001.01, VI(A)(1)(C), IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS* at 6 (May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

Had the Maryland Judicial Ethics Committee considered the history, purpose, and legislative intent of the U visa program and VAWA confidentiality protections that the 5th Circuit outlined in *Cazorla v. Koch Foods of Mississippi*, together with the distinctions between how judicial ethics ex parte communications rules treat open and closed cases, the Committee could have reached an outcome that is consistent with the goals of judicial ethics rules, the U visa program, and VAWA confidentiality protections. That outcome would be to conclude that ABA Model Code of Judicial Conduct Rule 2.9 ex parte communications bars apply to open cases and do not apply to completed or closed cases.

v. *How courts can comply with Rule 2.9 Ex Parte Communications Requirements in light of Violence Against Women Act (VAWA) confidentiality statutes*

The following best practices will assist courts in fairly and equitably balancing compliance with both ethical requirements under the ABA Model Code of Judicial Conduct and VAWA Confidentiality law's requirements and purpose.

Step 1: Ex Parte Communications Bar Exception

ABA Model Code of Judicial Conduct Rule 2.9(A)(5) states that “A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law to do so.” In seven (7) states, Rule 2.9(A)(5)'s ex parte communications exception applies as a matter of state law in California,²¹³ Colorado,²¹⁴ Nevada,²¹⁵ Oregon,²¹⁶ Utah,²¹⁷ Washington,²¹⁸ and Virginia.²¹⁹

²¹³ Cal. Penal Code. §679.10 (2023).

²¹⁴ Colo. Rev. Stat. § 24-4.1-401 (2021).

²¹⁵ Nev. Rev. Stat. §§ 217.580-217.585 (2019).

²¹⁶ Or. Rev. Stat. §147.620 (2023).

²¹⁷ Utah Code Ann Code § 77- 38-502 (2024).

²¹⁸ Wash. Rev. Code 7.98.020 (2017).

²¹⁹ Va. Code Ann. Code § 9.1-1501 (2021) (Virginia's confidentiality protections apply to judges hearing appeals of U visa certification requests denied or not responded to within statutory timeframes by state agencies required to grant or deny certifications under Virginia's U visa certification law).

Each of these states have state laws on U visa certification that include state law confidentiality provisions that would preclude a judge from disclosing information related to the victim's immigration status except to comply with the constitutional requirements in criminal cases as discussed above.²²⁰ Thus, in these states VAWA confidentiality protections preclude courts in both pending and completed cases from notifying the perpetrator through service of process or any other means that the victim is "seeking" a U visa.

However, in these states, as in all states, in open or pending cases the Model Code of Judicial Conduct Rules 2.2, 1.2, 2.7, and 2.11(A)(6)(d) on impartiality would still apply to judicial certifications by a judge presiding over an open or pending civil, family, or criminal. Therefore, to comply with VAWA confidentiality and state law confidentiality protections and at the same time comply with judicial ethics rules, judges who receive certification requests in open cases over which they are presiding should refer victims to Steps 2 and 3 discussed next.

Step 2: Judicial Leadership encouraging other agencies authorized by federal law to implement U visa certification practices - In criminal, child welfare, adult protective services and other cases involving state government agency staff (e.g., state departments of labor), federal statutes²²¹ and regulations²²² authorize all state law enforcement, prosecution, adult and child protective services, and labor enforcement agencies to sign U visa certifications. These agencies often detect immigrants who are victims of U visa qualifying criminal activities and who are assisting in their investigations and prosecutions long before the victims might come before a judge. When other agencies in the judge's jurisdiction are signing U visa certifications, the need for U visa certification by judges in open or pending cases drops precipitously reducing judicial ethical concerns and the need for recusal. Judges can play a leadership role that encourages government officials in the judge's jurisdiction to implement U visa certification practices.

²²⁰ For details see, Esma Karakas, Abigail Wolfe, and Leslye E. Orloff, *Review and Comparison of All State U and T Visa Certification Law Requirements* (December 27, 2024), <https://niwaplibrary.wcl.american.edu/pubs/u-and-t-visa-certification-state-law-requirements/>.

²²¹ 8 U.S.C. 1184(p)(1)

²²² 8 C.F.R. 214.14(a)(2)

Step 3: The Court selects a Certifier Judge - As discussed in Section III(A)(ii) above, courts in a number of jurisdictions have assigned one judge to become the Certifier Judge for the court. Some courts assign a judge who develops expertise in U visa certification and in other courts one of the court's presiding judges signs U visa certifications for the court. Judges hearing cases forward all U visa certification requests to the Certifier Judge or the Presiding Judge. According to the Superior Court of California, "this approach helps ensure uniformity of decision and a clear transparent process for the applicant."²²³ This approach is consistent with USCIS practice and guidance discussed in detail above. This best practice provides victims access to U visa certification by the courts in a manner that is consistent with all of the judicial ethical considerations discussed in this article. Additionally, it promotes access to justice for immigrant victims in a manner that does not jeopardize the protections federal VAWA confidentiality laws offer victims.

vi. Certification by a presiding judge in open and pending cases

Until courts implement all of a combination of steps 1-3 above, courts considering U visa certifications in open or pending civil, family, or criminal court proceedings will need implement notice and motion procedures that address the judicial ethical obligations of presiding judges and also comply with, and do not undermine, federal VAWA confidentiality protections. A VAWA confidentiality compliant motions and notice practice must follow the steps below:

1. Inform the applicant for U visa certification about the procedures that court will follow to issue a U visa certification. The judge should inform the person requesting U visa certification of the judicial ethical requirement that that judge presiding over the open pending case will require a motion requesting U visa certification from the presiding judge. That motion will need to be served on the defendant in a criminal case or on all parties in a civil or family law case to provide notice and a reasonable opportunity to be heard on the victim's motion for certification. This provides the victim an opportunity to safety plan and to decide whether or not to file the motion requesting that the judge presiding over the open court case involving the victim or to withdraw a request they

may have sent to the presiding judge. The victim may also decide to wait to request certification from the presiding judge until after the case before the judge has concluded or may decide to seek certification from another judge or government official. This approach also allows victims who decide to seek certification from the presiding judge to plan for the steps the victim may need to take to be able to safely attend a court hearing on the motion for certification at which the perpetrator will also be present.

2. Waiver of VAWA Confidentiality. In order for a judge to authorize service of a motion that reveals to a defendant or parties to a civil, family, or child welfare case that a victim is seeking U visa certification from a judge, the judge must first obtain from the victim a VAWA confidentiality waiver under 8 U.S.C. 1364 (b)(4). This waiver is only available if all adults involved in the case sign waivers and is not available when the victim is a child.²²⁴ The waiver's content and requirements are governed by 34 U.S.C. 12291(b)(2).²²⁵ Under this statute VAWA confidentiality waivers must be in writing, voluntary, time-limited, and limited for a specific purpose. In cases of U visa certification by a presiding judge in a pending proceeding the waiver would be solely for the limited purpose of the victim filing a motion for U visa certification from the judge and providing notice of that motion to the opposing part(ies) in a civil or family court case and/or to the perpetrator if it is an open criminal case.
3. Judge rules on whether to accept the VAWA confidentiality limited waiver. The judge receiving the VAWA confidentiality waiver will need to review the waiver and may need to ask questions of the victim to determine whether the waiver is:
 - Voluntary;
 - Time-limited; and
 - Limited for the specific purpose of the court considering and ruling on judicial U visa certification.

²²³ Superior Court of California, *U-Visa Certification Protocol* at 1 (2022), <https://niwaplibrary.wcl.american.edu/pubs/san-francisco-court-civil-division-u-visa-certification-protocol> (last visited Dec 10, 2024).

²²⁴ DHS, INSTRUCTION NUMBER: 002-02-001.01, VI(A)(1)(D)(4), IMPLEMENTATION OF SECTION 1367 INFORMATION PROVISIONS at 67(May 28, 2019), <http://niwaplibrary.wcl.american.edu/pubs/implementation-ofsection-1367-all-dhs-instruction-002-02-001/>.

²²⁵ These waiver requirement govern all waivers of Violence Against Women Act protections.

4. Written motion seeking U visa certification. The presiding judge in an open case will need to inform the victim seeking U visa certification that the court will require a written motion requesting judicial certification that will be served on the defendant or opposing parties in the case. This motion will need to be filed along with the VAWA confidentiality waiver discussed in paragraphs 2 and 3 above. Once the judge is satisfied that the VAWA confidentiality waiver meets the requirements, the judge may authorize service of the notice and motion on the defendant or opposing part(ies) and give them a reasonable opportunity to respond before ruling on or issuing the U visa certification.
5. VAWA confidentiality bars on release information about protected immigration cases. It is best practice for judges issuing U visa certifications in pending cases using the process described above to confirm for all parties that all information about the existence of, actions taken in, and information contained in any immigration case that the victim may file based on the U visa certification Form I-918B that the judge signed, remains protected by federal VAWA confidentiality laws, and is not discoverable except to comply with the prosecutor's constitutional obligations in a criminal prosecution.

vii. *U visa Certification in closed cases*

As the Minnesota Board on Judicial Standards correctly concluded, judicial ethics codes allow a judge to sign a U visa certification in a completed case so long as the judge has an adequate basis to support the averments made in the certification.²²⁶ In a court case that has been concluded or closed, a judge can gain an adequate basis to support the averments in the certification based on review of court records or on having presided over a civil, family, or criminal court matter that involved the immigrant seeking U visa certification.²²⁷ As discussed above, judges sign U visa certifications most commonly based on a victim's helpfulness to the court or other government agencies in detection of qualifying criminal activity the victim, or their child suffered.²²⁸ The Minnesota Board correctly concluded that the Rule 2.9 ex parte communications prohibitions only apply to require notice to parties only if a victim is seeking certification from a judge presiding over an open, but not a closed, case.²²⁹

The Maryland Judicial Ethics Committee also correctly concluded that completing a U visa certification does not violate Rule 3.1 because certification “is a judicial act because it is an action taken by a judge in the judge’s official capacity and in connection with some proceeding within the court’s jurisdiction.”²³⁰ The Maryland Committee came to the same conclusion as the Minnesota Board of Judicial Standards that judicial ethics code Rules 1.3, 2.10, and 3.3 do not bar judicial certifications in open or closed cases.²³¹

Additionally, both the Maryland Judicial Ethics Committee and the Minnesota Board of Judicial Standards²³² agree that judges, when sign U visa certifications, should consider recusing themselves from “any subsequent proceeding involving the same or similar issues and the same victim or person accused by the victim.”²³³

²²⁶ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 1, 5, 8 (June 26, 2015) at 1, 5, -8 <https://niwaplibrary.wcl.american.edu/pubs/mn-broard-judicial-standards-opinion-2015-2-final/> (Addressing Judicial Ethics Rules 1.2, 1.3, 2.2, 2.10, and 3.3 discussed in detail above).

²²⁷ USCIS, U VISA LAW ENFORCEMENT RESOURCE GUIDE FOR FEDERAL, STATE, LOCAL, TRIBAL AND TERRITORIAL LAW ENFORCEMENT, PROSECUTORS, JUDGES AND OTHER GOVERNMENT AGENCIES at 3 (February 28, 2022), <https://niwaplibrary.wcl.american.edu/pubs/u-visa-certification-resource-guide-2022/>; *In re Rosales*, 40 Misc. 3d 1216(A) (N.Y. Fam. Ct. 2013).

²²⁸ 72 Fed. Reg. 53,014, 53,020 (Sept. 17, 2007).

²²⁹ Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6-7 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-broard-judicial-standards-opinion-2015-2-final/>; Minnesota Judicial Training and Education Blog, Judge Alan F. Pendelton, *National Judicial Training Update 15-13, Immigrant Crime Victims & U-Visa Certification What is it and Why Should Judges Care? Ten facts that every judge (and attorney/officer) should know* at 5 (July 8, 2015) <https://niwaplibrary.wcl.american.edu/pubs/national-uvisa-judicial-training-update/>. (After a case has concluded judicial ethics code Rules 2.2, 2.9, 2.10, and 2.11 are no longer implicated in a civil or criminal case).

²³⁰ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 6 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>; Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges' Signing of Federal U visa Certifications – Supplemental Opinion* at 5 (October 17, 2024), <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u-visa/>.

²³¹ Maryland Judicial Ethics Committee, *Opinion 2023-20 Judges' Signing of Federal U visa Certifications* at 6-7, 13-15 (August 21, 2023), <https://niwaplibrary.wcl.american.edu/pubs/2023-20-md-judicial-ethics-opinion-u-visa/>; Maryland Judicial Ethics Committee, *Opinion 2024-24 Judges' Signing of Federal U visa Certifications – Supplemental Opinion* at 5 (October 17, 2024), <https://niwaplibrary.wcl.american.edu/pubs/2024-24-md-supplemental-judicial-ethics-opinion-u-visa/>.

²³² Minnesota Board of Judicial Standards, *Advisory Opinion 2015-2 U Visa Certification by Judges* at 6 (June 26, 2015), <https://niwaplibrary.wcl.american.edu/pubs/mn-broard-judicial-standards-opinion-2015-2-final/>.

Jurisdictions that select a Certifier Judge or have their Presiding Judge process U visa certification requests and issue U visa certifications for the court are better able to issue certifications while reducing the need for recusal and implicating judicial ethical concerns.

Finally, as described in detail in Section III(E) above, in closed cases judges can sign U visa certifications without implicating judicial ethics rules or ex parte communications bars in all states except Maryland. In Maryland, courts considering U visa certifications in closed cases will need to follow the procedures outlined (a)-(e) above²³⁴ for U visa certification by a judge in open cases including the requirement that the court first obtain and determine the voluntariness and content of the victim's VAWA confidentiality waiver before serving employing a notice and motions process that provides the perpetrator and all parties with notice that the victim is seeking U visa certification by a judge.

F. Conclusion

Congress created the U visa with the goal of improving access to justice for all victims and building trust in courts and the U.S. legal system. When judges, courts, and judicial ethics boards fully understand the Congressional intent to explicitly authorize judges to be U visa certifiers, they are better able to understand why judges are vital to the U visa protections Congress established. Not only are judges permitted to certify U visas in a wide variety of circumstances, there are many instances where judges may be the first or only certifying official a victim encounters.

This article has provided an overview of U visa certification and addresses myths and facts regarding U visa certification and the U visa program under U.S. immigration laws. It identifies assumptions and misperceptions about U.S. immigration laws contained in the four Judicial Ethics Board Opinions reviewed for this article and directs judges, judicial ethics boards, and courts, to the DHS policies, rules, and guidance that judges should consult to ensure that they are relying on legally accurate information about the U visa and the U visa certification process under federal immigration laws.

It is crucial that judges have legally accurate information about the U visa certification process, and that judges understand and employ the best practices discussed in this article so that more judges can and will sign U visa certifications in cases involving immigrant victims without fear of implicating judicial ethical codes of conduct. When judges better understand when and how they can ethically sign U visa certifications, judges help build trust in the judicial system and that greatly enhances access to justice,²³⁵ the goal that Congress envisioned for the U visa program.

²³³ Maryland Judicial Ethics Comm., Op. 24, 7 (2024) (Judges' Signing of Federal U Visa Certifications -- Supplemental Opinion).

²³⁴ Since there is no statute of limitations in U visa cases or for U visa certification requests requiring notice and motion procedures for judicial certification in close cases in addition to posing safety issues for the victim, can also involve complex service of process issues for the victim who will need to locate a perpetrator or party who has moved from the jurisdiction or is deceased or has become incompetent or incapacitated.

²³⁵ See, National Center for State Courts, *Promoting Access to Justice for Immigrant Crime Victims and Children: Findings of a National Judicial Survey and Policy Recommendations* (2018) <https://niwaplibrary.wcl.american.edu/pubs/trends-in-state-courts-survey-findings/>; Executive Summary – *Transforming Lives: How the VAWA Self-Petition and the U Visa Change the Lives of Victims and Their Children After Work Authorization and Legal Immigration Status* (June 8, 2021), <https://niwaplibrary.wcl.american.edu/pubs/executive-summary-final/>.

This project was supported by Grant No.15JOVW-21-GK-02256-MUMU awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in this publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the U.S. Department of Justice. The recipient also agrees to ensure that any subrecipient at any tier will comply with this condition.